IN THE

Supreme Court of the United States

October Term, 1976

No. 77-196

GENERAL FINANCE CORPORATION,
Petitioner,

v.

JOHN C. POLLOCK AND BARBARA POLLOCK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILTON W. SCHOBER
TERRENCE H. KLASKY
1750 Pennsylvania Avenue, N.W.
Suite 1107
Washington, D.C. 20006
(202) 393-4961

Attorneys for Petitioner

August 5, 1977

BEACON PRINTING · 293-7160 · Washington, D.C. 20036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

STATUTES:

TABLE OF AUTHORITIES (continued)

REGULATIONS:

FEDERAL RESERVE BOARD PUBLIC INFORMATION LETTERS:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES (continued)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

GENERAL FINANCE CORPORATION, *Petitioner*,

v.

JOHN C. POLLOCK AND BARBARA POLLOCK, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

General Finance Corporation ("GFC"), Petitioner, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 16, 1976, rehearing denied, May 27, 1977, confirming the judgment of the United States District Court for the Northern District of Georgia, entered on March 26, 1975, adopting the Recommendations of a Special Master for the U.S. District Court for the Northern District of Georgia, filed on February 28, 1975.

I. OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit to which this petition is addressed is reported at 535 F.2d 295 and also appears at page A-2 of the Appendix to this Petition. The Court of Appeals' order denying GFC's petition for a rehearing is reported at 552 F.2d 1142 and appears at page A-9 of the Appendix.

The order of the United States District Court for the Northern District of Georgia approving the Recommendations of the Special Master that was the subject of GFC's appeal to the Court of Appeals is unreported but appears at page A-14 of the Appendix.

The Recommendations of the Special Master for the United States District Court for the Northern District of Georgia upon which the District Court entered its order are unreported but appear at page A-16 of the Appendix.

II. JURISDICTIONAL STATEMENT

The order of the Court of Appeals denying rehearing was entered on May 27, 1977. This Court has jurisdiction to hear the Petition under 28 U.S.C. § 1254(1), and the Petition has been filed in the time required by 28 U.S.C. § 2101(c).

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Board of Governors of the Federal Reserve System ("Board") has the authority under the Federal Truth in Lending Act to promulgate regulations which obviate ambiguous provisions of that Act and facilitate compliance therewith.
2. Whether a disclosure made by a creditor in strict conformity with Regulation Z promulgated by the Board pursuant to the Truth in Lending Act can be held to constitute a violation of that Act.
3. Whether a creditor which complied with Regulation Z promulgated by the Board pursuant to the Truth in Lending Act can be held liable for civil penalties for violation of that Act.
4. Whether the Board has the authority to administer the Truth in Lending Act through staff Public Information Letters interpreting the provisions of Regulation Z, which the Board promulgated pursuant to that Act.

5. Whether Public Information Letters issued by the Board's staff, which consistently interpret a provision of Regulation Z to have a given meaning, are entitled to great weight and are to be the controlling interpretation of regulatory meaning.
6. Whether the last sentence of § 226.8(b)(5) of Regulation Z, 12 C.F.R. § 226.8(b) (5), which has no statutory counterpart but was promulgated by the Board under its broad rulemaking authority, requires creditors to inform borrowers that, pursuant to state law, any consumer goods acquired within ten days after a loan transaction were subject to a security interest under that transaction and that any consumer goods acquired after that date were not subject, notwithstanding a staff Public Information Letter to the contrary.
7. Whether the last sentence of § 226.8(b) (5) of Regulation Z, 12 C.F.R. § 226.8 (b) (5), which has no statutory counterpart but was promulgated by the Board under its broad rulemaking authority, requires creditors to inform borrowers that, pursuant to state law, future indebtedness is secured by all consumer goods acquired by the borrower within ten days of the creditor's having given value for the future indebtedness and that no security interest was retained in consumer goods acquired after that ten day period, notwithstanding a staff Public Information Letter to the contrary.

IV. STATUTES AND REGULATIONS INVOLVED

The Truth in Lending Act, 15 U.S.C. §§1601, *et seq.*, and Regulation Z, 12 C.F.R. Part 226, promulgated by the Board pursuant to that Act are principally involved. The specific sections of the Act involved are §§ 102(a); 105; 106(b), (c), (d), and (e); 111; 121(a); 129(a) (1), (2), (3), and (8); and 130(f) (15 U.S.C. §§ 1601(a); 1604; 1605(b), (c), (d), and (e); 1610; 1631(a); 1639(a) (1), (2), (3), and (8); and 1640 (f)), and the specific sections of Regulation Z involved are § 226.1(a) (2); §§ 226.4(a) (6) and (7), (b), (c), (d), and (e);

§ 226.6(c); and §§ 226.8(b)(5) and (d)(1) of Regulation Z (12 C.F.R. § 226.1(a)(2); §§ 226.4(a)(6) and (7), (b), (c), (d), and (e); § 226.6(c); and §§ 226.8(b)(5) and (d)(1)). The pertinent provisions of the Act and Regulation appear at pages A-22 to A-31 of the Appendix.

V. STATEMENT OF THE CASE

Respondents brought this action in the United States District Court for the Northern District of Georgia, alleging that Petitioner, GFC, a financial institution, had violated the Act and Regulation Z. Original jurisdiction in the United States District Court was thus conferred by § 130(e) of the Act, 15 U.S.C. § 1640(e).

The consumer credit transaction upon which this suit was brought was an instalment loan entered into by Respondents and Petitioner on September 12, 1973 in the amount of $171.36. Inasmuch as that transaction involved an extension of consumer credit other than open end, Petitioner furnished to Respondents the disclosures required by 15 U.S.C. § 1639(a) and 12 C.F.R. §§ 226.8(b) and (d). The required disclosures were made on the note evidencing the obligation, a copy of which was given to Respondents along with a copy of the security agreement which they also executed in connection with the transaction. Conformed copies of the note and security agreement appear at page A-41 of the Appendix.

The case was heard by a Bankruptcy Judge sitting as a Special Master for the United States District Court for the Northern District of Georgia on a motion for summary judgment. The Special Master filed his Recommendations for judgment in favor of Respondents on the grounds that—

1. GFC failed to itemize the amount of the check given to Respondents as proceeds of the loan, after deducting the amount of the premiums for voluntary credit life and disability insurance (which were itemized) from the disclosed "amount financed," all in violation of 15 U.S.C. § 1639(a) (1) and 12 C.F.R. § 226.8(d) (1);

2. GFC failed to disclose properly that Respondents' after-acquired property will be subject to GFC's security interest; and
3. GFC failed to disclose properly that Respondents' future indebtedness to GFC will be secured by GFC's security interest.

GFC's disclosure statement furnished to Respondents disclosed the "amount financed" as $171.36 as well as voluntary credit life and credit disability insurance premiums of $3.84 and $12.24, respectively. The net amount of the check paid to Respondents after deducting the aggregate amount of those premiums from the "amount financed" ($155.28) was shown without a label or description.

GFC relied on the provisions of 12 C.F.R. § 226.8(d) (1) which does not require disclosure of net loan proceeds; it only requires disclosure of the "amount financed" and itemization of "all charges . . . which are included in the amount of credit extended but which are not part of the financial charge."[1] Inasmuch as the net disbursement to the borrowers of the proceeds of the loan after deducting optional and voluntary insurance premiums are not "charges," of the type which may be excluded from the financial charge under 12 C.F.R. § 226.4,[2] GFC did not

[1]Appendix, p. A-29.

[2]Excludable "charges" under that section of Regulation Z relate to expenses incurred in connection with a consumer credit transaction, such as premiums for optional and voluntary credit life and disability insurance; fees for perfecting a security interest; license, title, and registration fees; and title examination fees. § 106(b),(c),(d), and (e) of the Act, 15 U.S.C. § 1605(b),(c),(d), and (e); 12 C.F.R. §§ 226.4(a)(6) and (7) and 12 C.F.R. §§ 226.4(b),(c),(d), and (e); Appendix, pp. A-22 and A-26.

individually itemize (*i.e.*, describe) the net proceeds. GFC also relied on the Board's Public Information Letter No. 271[3] holding that the proceeds of a loan, after deducting charges incurred in connection with the loan that are not part of the financial charge, need not be itemized.

Whether the credit life and credit disability insurance were optional and voluntary was never an issue in the case; however, Respondents did allege a violation in connection with disclosure of the term of such insurance. As to that claim, the Special Master found for GFC, and the issue was not raised on appeal.

With respect to after-acquired property, the only security interest taken was in "household and consumer goods,"[4] and GFC's disclosure statement indicated that the security agreement "may" cover such property. GFC used the word "may" in its disclosure ststement, because Georgia had adopted the Uniform Commercial Code,[5] which limits a security interest in after-acquired consumer goods to such goods acquired by the obligor within a period of ten days after the secured party gives value.[6] Thus, after-acquired consumer goods literally *may* (or *may not*) be subject to the security agreement, depending upon when they are acquired by the obligor.

The Special Master found a violation of the after-acquired property disclosure, however, because the security agreement described the secured property as "household and consumer goods . . . now or hereafter located in

[3]CCH, *Consumer Credit Guide*, Par. 30,522; Appendix, p. A-31.

[4]Appendix, p. A-41.

[5]Ga. Code Ann., §§ 109A-1, *et seq.*

[6]Ga. Code Ann., § 109A-9-204(4)(b); Appendix, p. A-30.

or about the premises constituting the Debtor's residence."[7] According to his Recommendations, failure to disclose that a security interest "will" be retained in after-acquired property was a violation, notwithstanding that under State law, consumer goods acquired more than ten days after GFC's having given value *will not* be so subject.

With respect to the security interest for future indebtednesses, it should be carefully noted that the most logical interpretation and, it is submitted, the intended meaning of the provisions of the last sentence of 12 C.F.R. § 226.8(b)(5) impose the obligation to disclose the security interest on future indebtedness *only* as it relates to after-acquired property. That sentence provides that "[i]f after-acquired property will be subject to the security interest, or if other or future indebtedness is *or may be* secured by *any such property*, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired"[8] (emphasis supplied). Thus, the security interest for future indebtedness need be disclosed *only* as that security interest "may" relate to after-acquired property.

GFC's disclosure relating to future indebtedness provided that any property which secured the current loan "may" secure future or other indebtedness. Again, GFC used the word "may" in its diclosure statement, because the only security interest taken was in consumer goods, and the provisions of the Uniform Commercial Code as adopted in Georgia limit any such security interest in consumer goods to only such goods as are acquired by the obligor within ten days after the obligee's having given value for the future indebtedness. Although GFC's security agreement was not conditional with respect to consumer goods acquired more than ten days after giving

[7]Appendix, p. A-41.

[8]Appendix, p. A-29.

value on future indebtedness, Georgia law under which the security agreement is enforced was conditional. Moreover, the security agreement was, in fact, conditional in that it stipulated that the security interest would not apply to any property for future indebtedness incurred after the current indebtedness had been paid in full. Thus, GFC's disclosure that the loan *may* secure future or other indebtedness was, quite literally, true. However, the Special Master found that use of the word "may" instead of the word "will' in GFC's disclosure relating to the security interest for future indebtedness was a violation.

In affirming the lower court's judgment with respect to itemization of the net proceeds of the loan after deducting charges for optional and voluntary credit insurance, the Court of Appeals found that although the "literal language of the regulation"[9] does not require itemization, the statute imposed different requirements. In short, the Court of Appeals found that 15 U.S.C. § 1639(a) required disclosure (itemization) of the net proceeds of the loan, although the provisions of 12 C.F.R. § 226.8(d)(1) implementing that section of the Act did *not* require itemization.

In affirming the holding of the lower court relating to the security interest in after-acquired property, the Court of Appeals arrived at the same conclusion as the District Court -- that there had been a violation -- but for different reasons. The Court of Appeals interpreted 12 C.F.R. § 226.8(b)(5) as requiring a lender, in its Truth in Lending disclosures, "to explain the 10 day limitation"[10] under the Uniform Commercial Code.

With respect to future indebtedness, the Court of Appeals found that the phrase "any such property" in the

[9]Appendix, p. A-5.

[10]Appendix, p. A-7.

last sentence of 12 C.F.R. § 226.8(b)(5) referred to "after-acquired property," and for that reason, lenders were required to disclose affirmatively the ten day limitation on the security interest in consumer goods for future indebtedness.

In denying the petition for rehearing, the Court of Appeals specifically reaffirmed its holding that the Truth in Lending Act requires a creditor to make a labeled disclosure of net loan proceeds, notwithstanding the "more natural reading of § 226.8(d)(1)"[11] of Regulation Z to the contrary.

The Court of Appeals also reaffirmed without modification its holding that a creditor must disclose the ten-day limitation on a security interest in after-acquired consumer goods. However, in reaffirming its position on disclosure of a security interest for future indebtedness, the Court of Appeals changed its interpretation of the proper meaning of the phrase "any such property" in the last sentence of 12 C.F.R. § 226.8(b)(5), holding that that phrase referred to "property to which the security interest relates" in the first sentence of that paragraph -- an interpretation which breaks every rule of grammatical construction.

The matter of immunity from civil liability for good faith reliance on the Board's regulation was first raised in the petition for rehearing. Section 408(e) of the Depository Institutions Amendments Act of 1974[12] added a new subsection (f) to 15 U.S.C. § 1640 which provides that no civil liability " . . . shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board."[13] Moreover, that

[11]Appendix, p. A-11.

[12]Act of October 28, 1974, Pub. L. No. 93-495.

[13]Appendix, p. A-25.

defense was specifically made available in any case wherein review was still available, "whether by appeal or otherwise." Although the Court of Appeals found that GFC's assertion of the defense on petition for rehearing was timely, it refused to rule whether that defense against civil penalties for failure to itemize the proceeds of the loan was available to GFC on the basis that violations relating to disclosure of the security interest in after-acquired property and in connection with future in debtedness justified the imposition of the civil penalties.

VI. REASONS FOR GRANTING THE WRIT

1. **The Court below has struck down the broad regulatory authority of the Board of Governors of the Federal Reserve System under the Truth in Lending Act in direct conflict with an applicable decison of this Court.**

The judgment below would strike down and render null the broad regulatory authority of the Board of Governors of the Federal Reserve System ("Board") under the Act. Section 105 of the Act, 15 U.S.C. § 1604, specifically authorizes the Board to include in its regulation ". . . such judgments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper . . . to facilitate compliance [with the Act]."[14] Furthermore, 15 U.S.C. § 1631(a) requires that each creditor " . . . shall disclose clearly and conspicuously, in accordance with the regulations of the Board."[15]

This Court, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), confirmed the Board's authority to extend by regulation the coverage of the Truth in Lending Act to transactions payable in more than four instalments where no separate finance charge was im-

[14]Appendix, p. A-22.

[15]Appendix, p. A-24.

posed. There, the Court made the following observation:

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to *entrust its construction* to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. (411 U.S. at 365) (emphasis supplied)

Mourning, supra, dealt with the Board's authority to promulgate regulations "to prevent circumvention or evasion" of the Truth in Lending Act. In reversing the Court of Appeals for the Fifth Circuit in *Mourning, supra*, the Court said:

> [W]e cannot agree with the conclusion of the Court of Appeals that the Board exceeded its authority in promulgating the Four Installment Rule. Congress was clearly aware that merchants would evade the reporting requirements of the Act by concealing credit charges. In delegating authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power. (411 U.S. at 371)

The rulemaking authority of the Board under § 105 of the Act, 15 U.S.C. § 1604, is not limited to preventing circumvention or evasion. It extends equally to authority to "facilitate compliance" with the Act. In the case at bar, the wisdom of Congress in granting to the Board such a broad delegation of authority is vindicated. As written, 15 U.S.C. § 1639(a) contains the following internal inconsistency:

- Paragraph (1) requires disclosure, *inter alia*, of the "amount of credit . . . which is or will be paid . . . to another person on his [obligor's] behalf,"[16] which in the case at bar is the aggregate amount of the voluntary and optional credit insurance premiums deducted from the "amount financed" on the borrower's instructions and paid to the insurer on the borower's behalf;
- Paragraph (2) requires disclosure of "all charges individually itemized which are included in the amount of credit extended but which are not part of the finance charge,"[17] which in the case at bar are the respective amounts of the same credit insurance premiums; and
- Paragraph (3) requires disclosure of "the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2),"[18] thus including the amount of the insurance premiums twice in the amount financed.

Premiums on optional and voluntary credit insurance of the type involved in the case at bar clearly are a part of the credit paid to another person -- under Georgia law,[19] to or on behalf of an agent licensed by the insurance commissioner -- on the obligor's behalf.

Thus, as written, 15 U.S.C. § 1639(a) imposes the absurd requirement that, in any transaction involving "charges" which are included in the amount financed and are excluded from the finance charge, the amount of such

[16]Appendix, p. A-24.

[17]Appendix, p. A-24.

[18]Appendix, p. A-25.

[19]Ga. Code Ann., § 24-315(c).

"charges" be included twice in computing the amount financed. And absurd consequences are never presumed. *Kreitlein v. Fergen*, 238 U.S. 21 (1915); *United States v. Kirby*, 7 Wall. 482 (1869). Moreover, including such charges twice in computing the disclosed amount financed would frustrate the purpose of the Act, which is to assure a "meaningful disclosure of credit terms."[20]

In drafting Regulation Z, the Board recognized the internal inconsistency in the Act, and in 12 C.F.R.§ 226.8(d)(1) simply required disclosure of the "amount financed" and all other charges, individually itemized, which are included in the amount of credit extended but which are not part of the financial charge.[21] And the Board has consistently held that that provision of the Regulation does not require itemization of cash proceeds of a loan.

In explaining its reason for drafting the Regulation as it now stands, the Board in its brief as *Amicus Curiae* in support of defendant-appellant's petition for rehearing in the Court below explained that the " . . . Regulation eliminates the possibility that certain 'charges' will be counted twice in arriving at the 'amount financed'."[22]

The Court of Appeals saw no such internal inconsistency in the statute, observing that 15 U.S.C. § 1639(a)(1) referred to "consolidation loan payments and the like;" 15 U.S.C. § 1639(a)(2) referred to "incidental charges such as credit insurance;" and 15 U.S.C. § 1639(a)(3) required the summation of the two.[23]

[20]15 U.S.C. § 1601(a); Appendix, p. A-22.

[21]Appendix, p. A-29.

[22]Brief for *Amicus Curiae* at 9, *Pollock v. General Finance Corporation*, 552 F.2d 1142 (5th Cir. 1977).

[23]Appendix, p. A-25.

This provision in the Board's Regulation became effective on July 1, 1969, the effective date of the Act, and has never been amended. It reflects the Board's judgment as to the manner in which the Act's mandates and purposes would be most effectively implemented. As such, the Regulation is a "contemporaneous construction" of the Act and is entitled to great deference. In *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), the Court stated "[p]articularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction' of a statute by the men charged with the responsibility of setting its machinery in motion, making the parts work efficiently and smoothly while they are yet untried and new." (367 U.S. at 408). Accord, *Udall v. Tallman*, 380 U.S. 1 (1965).

In *Mourning, supra*, the Court made the following additional observations: "That some other remedial provision might be practicable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." (411 U.S. at 371).

Courts are not generally free to substitute their own discretion for that of an administrative agency that has kept within the bounds of its powers, unless the rules of that agency are " . . . the expression of a whim rather than an excercise of judgment."[24] Such is clearly not the case here. "Whim" is defined as a "capricious or eccentric idea, notion, or vagary usu., occurring suddenly or spon-

[24] *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236 (1936).

taneously."[25] It is submitted that the Board's Regulation which resolves what an experienced administrative agency perceives to be an internal inconsistency in the statute cannot by any stretch of semantic imagination be considered a "whim."

Not only is the Regulation to be accorded great deference because it is a "contemporaneous construction" of the statute, but also because Congress has reviewed the statute a number of times and amended it at least five times[26] without reversing the Board's Regulation. Thus, it may be presumed that the Regulation reflects congressional intent.

A case directly in point is *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974). That case involved the question of whether the National Labor Relations Act ("NLRA"), as amended by the Taft-Hartley Act, excludes "managerial employees" from the protection of NLRA. The Wagner Act (the original NLRA) did not expressly mention the term "managerial employee" but the National Labor Relations Board created that category by regulation as one which may not be included in a bargaining unit with rank-and-file employees. The Taft-Hartley amendments created several other categories of excluded employees but did not specifically mention "managerial employees." In holding that Congress intended to exclude "managerial employees" from the protection of NLRA, the Court said:

> [A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where the

[25] *Webster's Third New International Dictionary* (Springfield, Mass: G. & C. Merriam Company (1961)).

[26] Act of October 26, 1970, Pub.L. 91-508; Act of October 28, 1974, Pub.L. 93-495; Act of January 2, 1976, Pub.L. 94-205; Act of February 27, 1976, Pub.L. 94-222; Act of March 23, 1976, Pub.L. 94-240.

> Congress has re-enacted the statute without pertinent change. *In these circumstances, Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.* (416 U.S. at 274) (emphasis supplied)

Accord, *Red Lion Broadcasting Co. v. Federal Communications Commission, et al.*, 395 U.S. 367, 381 (1969); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); and *National Labor Relations Board v. Boeing Co., et al.*, 412 U.S. 67, 75 (1973).

Three of the five amendments to the Act passed since the Board promulgated 12 C.F.R. § 226.8(d)(1) have dealt specifically with the Board's regulatory authority by extending and enhancing it, not by restricting or otherwise diminishing it. And none of those laws have revised, repealed, or otherwise altered 12 C.F.R. § 226.8 (d)(1). Under the foregoing authorities, the conclusion is inescapable that Congress intended the Board's Regulation to stand. This Court should affirm the Board's authority to promulgate such a Regulation and should affirm the efficacy of that Regulation as promulgated.

2. The judgment in this case is in total disregard of, and direct conflict with, § 121(a) of the Truth in Lending Act, 15 U.S.C. § 1631(a).

Courts are not free to disregard the clear mandate of a duly enacted statute.

> In the construction of statutes, the courts start with the assumption that the legislature intended to enact an effective law, and the legislature is not to be presumed to have done a vain thing in the enactment of a statute.
>
> * * *
>
> An interpretation should, if possible, be avoided under which the statute or provision being construed is defeated, explained away, or rendered insignificant, meaningless, inoperative or nugatory. (73 Am.Jur.2d, Statutes, § 249)

Accord, *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938); *Crowell v. Benson*, 285 U.S. 22 (1932); *Graham v. Goodcell*, 282 U.S. 409 (1931); and *Imperial Production Corp. v. Sweetwater*, 210 F. 2d 917 (5th Cir. 1954).

Section 121 (a) of the Act, 15 U.S.C. § 1631 (a), imposes the *obligation* that creditors "shall disclose . . . in accordance with the regulations of the Board."[27] Moreover, § 503 of the Consumer Credit Protection Act, 83 Stat. 167, which sets out the rules of grammatical usage for the Act, provides that "[t]he word 'shall' is used to indicate that an action is both authorized and *required.*" (emphasis supplied).

Thus, the use of the word "shall" in 15 U.S.C. § 1631 (a) indicates that Congress intended that the Board's Regulations be the last word in determining disclosures. The clear purpose of this provision is to give creditors the certainty that if they comply with the disclosure requirements of the Board's Regulations, they will have made all the disclosures required by law. Following this statutory mandate the Board drafted Regulation Z ". . . in a form that would serve not only as a legal directive for implementing the Act, but also as an operating handbook."[28]

It is not at issue here whether GFC complied with Regulation Z; clearly it did. In fact, that is the precise reason it was cast in judgment on this issue: it complied to the letter with the Board's Regulation.

---

[27] Appendix, p. A-24.

[28] Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1969, January 3, 1970, at 2.

A creditor's rights and obligation to rely upon the Board's Regulations and other authoritative interpretations have twice been reaffirmed and expanded by Congress. In 1974, Congress amended the civil liability provisions of the Act[29] specifically to provide that a creditor may not be held liable for either civil or criminal penalties for any act done or omitted in good faith in reliance on any rule, regulation, or interpretation of the Board, even if the rule, regulation or interpretation is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason. The Act was amended in 1976[30] to permit creditors to rely upon interpretations or approvals of officials of the Board's staff who have been duly authorized by the Board to issue such interpretations or approvals.

It is apparent from this statutory structure, particularly in view of the requirements of 15 U.S.C. § 1631 (a), that Congress intended that creditors must look to the Board's Regulations for instruction and guidance on how to make disclosures, and, similarly, that creditors are able to rely upon the Board's Regulations in making those disclosures. That intent should be confirmed by this Court.

3. The judgment in this case leaves in substantial doubt the authority of the Board of Governors of the Federal Reserve System to administer the highly technical provisions of the Truth in Lending Act with precision and certainty for the benefit of all persons subject to the Act.

Congress made it abundantly clear that the Board of Governors of the Federal Reserve System was to have broad authority to institute and maintain uniform administration of the Act for all types of credit in all parts of

[29]Act of October 28, 1974, Pub.L. 93-495.

[30]Act of February 27, 1976, Pub.L. 94-222.

this Nation. H.R. 11601, 90th Cong., 1st Sess. (1967), was the Truth in Lending bill which passed the United States House of Representatives and was referred to the Committee of Conference to be reconciled with a similiar Senate bill, S. 5, 90th Cong., 1st Sess. (1967). The delegation of regulatory authority to the Board in H.R. 11601 survived almost verbatim in 15 U.S.C. § 1604.[31] Accordingly, it is appropriate to look at the legislative history of this provision in order to ascertain legislative intent and to confirm the literal meaning of the language used in the Act. *Addison, et al. v. Holly Hill Fruit Products, Inc.*, 232 U.S. 607 (1944); *United States v. Public Utilities Commission of California, et al.*, 345 U.S. 295 (1953); *United States v. Bryan*, 339 U.S. 323 (1950).

The Report of the Committee on Banking and Currency, House of Representatives, to accompany H.R. 11601[32] makes very clear this congressional intent to confer broad regulatory authority:

> All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions or in the advertisement of credit transactions shall be issued by the Board of Governors of the Federal Reserve System. *No one can deny their experience and expertise in these matters.* Accordingly, it is the view of your committee that, for the uniformity of application to all affected segments

[31]Section 204(c) of H.R. 11601, *supra*, as reported to the House of Representatives by the Committee on Banking and Currency provided as follows:

> "Any regulation prescribed under this section may contain such classifications and differentiations and may provide for such adjustments and exceptions for any class of transactions as in the judgment of the Board are necessary or proper to effectuate the purposes of Section 203 or prevent circumvention or evasion thereof, or to facilitate compliance by creditors with Section 203 or any regulation issued under this section."

[32]H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967).

of the industries concerned, a single set of comprehensive regulations should be issued.

* * *

The Board of Governors of the Federal Reserve System is to be the central, single agency for *issuing all regulations on credit disclosure* or on the advertising of credit to insure a single set of overall standards applicable to all forms of consumer credit.... (at 18-19) (emphasis supplied)

The 93rd Congress reviewed and reenforced this administrative authority. Title II of S. 2101,[33] the Truth in Lending Amendments which eventually became law as part of the Depository Institutions Amendments Act of 1974, *supra*, upgraded creditors' protection by providing immunity from civil and criminal liability for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation of the Truth in Lending Act by the Board. In the Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to accompany S. 2101,[34] the Committee referred to the Truth in Lending Act as being "highly technical" (at 13) and subject to "hyper-technical litigation" (at 14), and thus enhanced the Board's rulemaking authority so that a creditor could not be forced ". . . to choose between the Board's construction of the Act and the creditor's own assessment of how the court may interpret the Act" (at 13).

Thus, there is presented in the case at bar an important question of Federal law which has not been, but should be, settled by this Court: § 105 of the Act, 15 U.S.C. § 1604,

[33]93rd Cong., 2nd Sess. (1974).

[34]S. Rep. No. 93-278, 93rd Cong., 1st Sess. (1973).

gives the Board broad authoirty to promulgate regulations which "facilitate compliance" with the Act;[35] § 130 of the Act, 15 U.S.C. § 1640(f), contemplates that courts shall have the authority to hold such regulations to be "invalid;"[36] and yet § 121(a) of the Act, 15 U.S.C. § 1631 (a), contains the unqualified mandate for the creidtors to make disclosures "in accordance with the regulations of the Board."[37] This internal inconsistency was not addressed directly by the Court of Appeals, thus leaving in substantial doubt the Board's authority to administer the Act. It should be resolved by this Court.

4. The Court of Appeals decided that the Federal Truth in Lending Act mandates detailed disclosure of the creditor's rights and duties under state laws, and that any right asserted in the contract by the creditor which was not premitted by state law would constitute a violation of the Truth in Lending Act, if the disclosures agreed with the contract. This is an important question of Federal law which has not been, but should be, settled by this Court.

In *Pennino v. Morris Kirschman & Co., Inc.*, 526 F. 2d 367 (5th Cir. 1976), the court held that ". . . the Act does not require a creditor to narrate the law of the forum state but requires simply a meaningful disclosure of the credit terms he *intends* to charge" (at 371; emphasis supplied). Thus, *Pennino* only requires the creditor to disclose the rights he claims in his contract. However, the decision of the same court in the case at bar requires a creditor to disclose only those rights he can assert consistent with state law, irrespective of the terms he intends to impose.

[35]Appendix, p. A-22.

[36]Appendix, p. A-25.

[37]Appendix, p. A-24.

This dichotomy is best illustrated by the decision in *Pinkett v. Credithrift of America, Inc., No. 2,* 430 F. Supp. 113 (N.D.Ga. 1977) in which the court laid out its dilemma as follows:

> This court originally attempted to reconcile *Pennino* with the *Pollock* doctrine . . . In retrospect, this court finds such reconciliation unconvincing; *Pennino* and *Pollock* stand on opposing principles. *Pennino* only requires the creditor to disclose the rights he claims in his note, while *Pollock* requires him to disclose only those rights he can assert consistent with state law. The Special Master urges this court to follow *Pollock*, the more recent pronouncement, but the court believes that *Pennino* sets the better course .... (430 F.Supp. at 117)

The case at bar is the later of the two cases in conflict; yet, in its opinion, the Court of Appeals did not specifically overrule the earlier *Pennino* decision. Accordingly, all of the District Courts within the Fifth Circuit, which are, presumably, bound by both the *Pennino* and *Pollock* decisions, find themselves in the dilemma of deciding which is a proper statement of the requirements of the Act. Creditors and consumers face that same dilemma.

The need for certainty under the Truth in Lending Act and Regulation Z is particularly important in the United States Court of Appeals for the Fifth Circuit. During the last four fiscal years reported (1973 through 1976), 55.57% of all Truth in Lending cases filed in U.S. District Courts were filed in District Courts under the jurisdiction of the Fifth Circuit.[38] Thus, it is all the more important that the conflict between two decisions of that Court of Appeals be resolved by this Court.

That conflict brings into sharp focus an important

[38]ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976, (Washington: U.S. Government Printing Office, 1977) at 200.

questions of Federal law which has not been, but should be, settled by this Court: Does the Truth in Lending Act require a creditor to disclose the rights that a creditor *claims* in the contract documents, or does the Act require the creditor to disclose only those rights which may be *asserted* under state law?

Both the Act and Regulation Z are clear in this regard. Section 111 of the Act, 15 U.S.C. § 1610,[39] specifically leaves the matter of the validity and enforcement of any contract to applicable state law. Moreover, the Act does not annul, alter, or affect the scope or applicability of state law. Thus, the Congress was clearly leaving the substantive provisions of state law and the enforcement of state law to state authority, reserving to Federal law only the disclosures clearly required by the Act.

The Board properly interpreted this congressional intent in Regulation Z where it provided that "[n]either the Act not this Part is intended to control charges for consumer credit, or to interfere with trade practices except to the extent that such practices may be inconsistent with the purposes of the Act."[40] Furthermore, 12 C.F.R. § 226.6 (c) permits, but does not require, creditors to supply "additional information or explanations," including "any provision of State law."[41] Thus, both Congress and the Board have left disclosure and enforcement of the substance of state contract law where it belongs—with the states. Disclosure is permitted, but not required.

The unintended complexity which will surely result if the Court of Appeals in the case at bar is not reversed is

[39]Appendix, p. A-24.

[40]12 C.F.R. § 226.1(a)(2); Appendix, p. A-25.

[41]Appendix, p. A-28.

best described in the opinion in *Pinkett v. Credithrift of America, Inc., No. 2, supra:*

> The [Truth in Lending] Act does not give the consumer the right to know all the creditor's rights and duties under state law. If the terms of the credit agreement violate that law, the consumer is free to resort to remedies provided by the state . . . [I]f the Congress wanted it any other way, it would have said so. But if this court were to follow *Pollock* to its logical conclusion, the result would be the opposite: all notes which violated state law in the various areas pertinent to the Act would automatically give rise to a violation of the Act if the disclosure statements were consistent with the note.
>
> Enforcement of this laudable Act has become confusing enough, without engrafting onto it the laws of the fifty states . . . [A] faithful adherence to *Pollock* can rapidly lead the courts astray. (430 F.Supp. at 117-18)

Because of this complexity, the Board has been quite consistent in minimizing the requirements relating to disclosure of the terms of state contract law in its interpretations of the Act and Regulation Z. For example, even though 12 C.F.R. § 226.8 (b) (5) requires a "clear identification of the property"[42] to which a security interest relates, the Board has consistently held that a reasonable short-form disclosure was permissable. The Board's Public Information Letters No. 509 and 521[43] permit reference to "common stock" and "household goods," respectively, rather than requiring a detailed listing of each item of collateral.

Thus, the Board charted the course toward reasonable and commercially feasible interpretation of the Act and

[42]Appendix, p. A-29.

[43]CCH, *Consumer Credit Guide*, Par. 30,712 and Par. 30,727; Appendix, pp. A-32 and A-34.

Regulation, a course which is reflected in the Recommendations of the Special Master adopted by the District Court in *Burrell v. City Dodge, Inc.*, (No. 18739, N.D.Ga., June 21, 1974)[44] that "Regulation Z does not require a lender to give the consumer a short course in commercial transactions," and in the later opinion of the Court of Appeals for the Fifth Circuit in *Pennino, supra*, that ". . . the Act does not require a creditor to narrate the law of the forum state." (526 F.2d at 371).

More recently, the Board reaffirmed its position that disclosure of the "type" of the security interest retained or acquired may be made very generally. In Official Staff Interpretation FC-0023[45] issued pursuant to the amendment to 15 U.S.C. § 1640 (f) made by Public Law 94-222, the Board held that the requirement of 12 C.F.R. § 226.8 (b)(5) relating to disclosure of the "type" of security interest is satisfied by disclosure of a "security interest under the Uniform Commercial Code," saying that the Regulation does not require a detailed statement of the type of security interest or a citation to any specific statutory provision.

The Board has taken a parallel position regarding the meaning of the after-acquired property disclosure in 12 C.F.R. § 226.8 (b) (5). The Board's Public Information Letter No. 983[46] holds that disclosure of the *fact* that after-acquired property will be subject to the security interest is sufficient to comply with the Regulation.

Public Information Letter No. 1053[47] reemphasized and

[44]CCH, *Consumer Credit Guide*, Par. 98,764, p. 88,385, 88,388.

[45]41 *Federal Register* 52981; Appendix, p. A-38.

[46]CCH, *Consumer Credit Guide*, Par. 31,323; Appendix, p. A-35.

[47]CCH, *Consumer Credit Guide*, Par. 31,395; Appendix, p. A-37.

further clarified the Board's intent with respect to the requirements of Regulation Z relating to the disclosure of the security interest in after-acquired property, holding specifically that disclosure of the ten-day limitation under § 9-204 of the Uniform Commercial Code was *not* required for Truth in Lending purposes. Inasmuch as Georgia has enacted the pertinent provisions of that section of the U.C.C. intact,[48] the decision of the Court of Appeals on this point of law should be reversed.

Furthermore, a disclosure that after-acquired property "will" be subject to a security interest when, in fact, such property acquired more than ten days after consummation will *not* be so subject would be "inaccurate and misleading in violation of Regulation Z," Public Information Letter No. 1053, *supra*.

Similarly, the decision of the Court of Appeals with respect to the disclosure of the fact that future indebtedness would be secured by the security agreement is at odds with the rationale of the foregoing Public Information Letters. The better reading—indeed, the only grammatically sound reading—of 12 C.F.R. § 226.8(b)(5) imposes the obligation on creditors to disclose the security interest on future indebtedness *only* as it relates to after-acquired property. Thus, in the case at bar the security for future indebtedness need by disclosed *only* as that security might relate to after-acquired consumer goods.

The Board's Public Information Letters indicate clearly that "... a simple disclosure of the fact that after-acquired property may be subject to the security interest would be sufficient," Public Information Letter No. 1053, *supra*. Both logic and equity demand a parallel construction for the disclosure of the security interest in consumer goods for future indebtedness.

Not only have the courts consistently upheld the Board's

[48]Ga. Code Ann., § 109A-9-204(4)(b); Appendix, p. A-30.

regulatory authority, they have also consistently held that the Board's interpretations and staff opinions are entitled to great weight in interpreting the Truth in Lending Act and Regulation Z. In *Philbeck v. Timmers Chevrolet, Inc., et al.*, 499 F.2d 971 (5th Cir. 1974), the court said

> [W]e deal primarily with four sources of law and interpretation: the Truth in Lending Act itself; Regulation Z, which was promulgated by the Board pursuant to the broad powers granted it under Section 105 of the Act; the Federal Reserve Board Interpretations of Regulation Z, 12 C.F.R. §§ 226.201 *et seq.*; and the Federal Reserve Board's staff opinions, which explain the provisions of the three foregoing authorities, usually in answer to a query regarding a particular factual situation. *The three latter authorities, although not binding on the Court, are entitled to great weight, for they constitute part of the body of "informed experience and judgment of the agency to whom Congress delegated appropriate authority."* (499 F.2d at 976) (emphasis supplied)

Similarly, in *Bone v. Hibernia Bank, et al.*, 493 F.2d 135 (9th Cir. 1974) the court concluded that "great deference" is to be given to the Board's construction of the "complex requirements" of its own Regulation "because of the important interpretative and enforcement powers granted this agency by Congress under the Truth in Lending Act." (493 F.2d at 139).

It is the Board's position that "the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board."[49] The Board relies heavily upon the staff's Public Information Letters in the administration of the Truth in Lending Act. Furthermore, it is clear that Congress intended (and the courts have consistently agreed) that the Board has great "flexibility [and] broad rulemaking authority" (*Mourning, supra*, at 372). The

[49]Public Information Letter no. 444; CCH, *Consumer Credit Guide*, Par. 30,640; Appendix, p. A-32.

Court of Appeals has recongized that authority in prior opinions (*e.g. Philbeck, supra*). This Court should confirm that authority in the case at bar and confirm that creditors must disclose the various rights pertinent to the Truth in Lending Act as *claimed* in the contract documents.

VII. CONCLUSION

The clear and unequivocal provisions of 12 C.F.R. § 226.8(d)(1) do not require itemization of the net cash proceeds of a loan paid to the borrower; several of the Board's Public Information Letters reiterate that such a disclosure need not be made. Both the Regulation and the staff opinions are entitled to great weight, because they resolve an internal statutory conflict which would have imposed an absurd compliance requirement, one at odds with the purpose of the Act. They should be controlling in the case at bar.

Similarly, the requirement regarding disclosure of a security interest in after-acquired property is imposed by Regulation Z, not the Truth in Lending Act. Accordingly, the Board's staff interpretations are entitled to particularly great deference in interpreting those requirements. Failure to accord them such deference has left in shambles the Board's ability to administer effectively the Act and Regulation Z. Those letters should have been controlling in the case at bar.

Since the security interest in consumer goods which secures future indebtedness is limited to such goods acquired within ten days after the secured party gives value, the Board's Public Information Letters relating to

the after-acquired property disclosure should also have been controlling in the case at bar.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Milton W. Schober

Milton W. Schober

/s/ Terrence H. Klasky

Terrence H. Klasky

1750 Pennsylvania Avenue, N.W.
Suite 1107
Washington, D.C. 20006
(202) 393-4961

August 5, 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-196

GENERAL FINANCE CORPORATION,
Petitioner,

v.

JOHN C. POLLOCK AND BARBARA POLLOCK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MILTON W. SCHOBER
TERRENCE H. KLASKY
1750 Pennsylvania Avenue, N.W.
Suite 1107
Washington, D.C. 20006
(202) 393-4961

Attorneys for Petitioner

August 5, 1977

BEACON PRINTING · 293-7160 · Washington, D.C. 20036

INDEX

IN THE

Supreme Court of the United States

October Term, 1976

No.

GENERAL FINANCE CORPORATION,
Petitioner,

v.

JOHN C. POLLOCK AND BARBARA POLLOCK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

United States Court of Appeals,
Fifth Circuit.

John C. POLLOCK and Barbara Pollock,
Plaintiffs-Appellees,

v.

GENERAL FINANCE CORPORATION,
Defendant-Appellant.
No. 75-2017.

July 16, 1976.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, McCREE and TJOFLAT, Circuit Judges.

McCREE, Circuit Judge.

This is an appeal by the defendant from an adverse judgment in a truth-in-lending action. 15 U.S.C. § 1639. The district court determined that the defendant had violated the requirements of Regulation Z, 12 C.F.R. § 226.8, by failing to inform the borrowers in the disclosure statement about (1) the actual proceeds of the loan, (2) the fact that after-acquired property was subject to a security interest and (3) the consequence that any future indebtedness was secured by property used to secure the present loan. We affirm.

This case was heard by Bankruptcy Judge William L. Norton, Jr., sitting as a Special Master for the U.S. District Court for the Northern District of Georgia. On February 28, 1975, Judge Norton filed his Recommendations and on March 26, 1975, the district court adopted the Special Master's Recommendations and entered judgment in favor of the plaintiffs.

It appears from the record that on September 12, 1973, appellees obtained a loan ("consumer credit" under 15

U.S.C. §§ 1602 (e), (h)) in the amount of $155.28. The disclosure statement, however, failed to state expressly that the loan proceeds were $155.28. Instead, the statement indicated that the "amount financed" was $171.36. The statement separately itemized the charges for credit life insurance and disability credit insurance of $3.84 and $12.24, respectively. The "amount financed" was defined in another part of the disclosure statement as including insurance charges and the principal amount of the loan.[1]

The district court adopted the bankruptcy judge's recommended finding that a violation of 12 C.F.R. § 226.8(d)(1) had occurred. That section provides that the "amount of credit . . . which will be paid to the customer . . ., including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge" must be disclosed. The bankruptcy judge determined that the principal amount of the loan ($155.28) represented a part of the amount of credit extended and that individual itemization was required.

The district court further determined that the disclosure statement phraseology about future indebtedness and about security interests in after-acquired property conflicts with the corresponding language of the security agreement. With respect to after-acquired property, the disclosure statement recites that the security agreement "*may* cover after-acquired property." The pertinent language of the security agreement indicates, however, that a security interest *would be retained* in "all of the household and consumer goods . . . now or hereafter located in . . . the Debtor's residence . . . ." With respect to future indebtedness, the next sentence in the disclosure statement provides that "[a]ny chattel or

[1](Footnote omitted) Copy of disclosure statement provided by General Finance appears at page 41 of the Appendix.

real property which secured this loan *may* secure future or other indebtedness." The security agreement, however, indicates that future indebtedness incurred by the debtor "at any time before the entire indebtedness secured thereby shall be paid in full" *would be secured* by the property described in the security agreement.

With respect to these two disclosures, the court determined that General Finance had failed to "clearly set forth" the fact that after-acquired property *will be* subject to the security interest or that future indebtedness *will be* secured by property listed in the security agreement. It concluded that General Finance thereby violated 12 C.F.R. § 226.8(b)(5).[2]

The first issue we consider is whether the district court erred in determining that the failure of General Finance to separately itemize the amount of the loan proceeds was a violation of § 226.8(d)(1). The regulation requires disclosure of the "amount of credit . . . which will be paid to the customer . . . including *all charges, individually itemized,* which are included in the amount of credit extended but which are not part of the finance charge . . . ." The disclosure statement here clearly identifies and itemizes $3.54 and $12.24 as credit insurance charges. However, it does not expressly identify and itemize the principal amount borrowed.[3]

District Judge O'Kelley made the following observation about § 226.8(d)(1) which would support the conclusion

[2]The regulation provides in pertinent part that: "If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth . . ."

[3]We observe that the Office of Saver and Consumer Affairs of the Federal Reserve System has issued an opinion letter to General Finance stating that it did 'not consider the basic amount of loan proceeds to be a 'charge' within the meaning of § 226.8(d)(1) and thus [did] not believe that this amount must be individually described under that section.'

that the principal amount of loan proceeds need not be itemized:

> It appears to this court that the phrase, "which are included in the amount of credit extended but which are not part of the finance charge," clearly refers to the charges because otherwise there would be no need for the "but which are not part of the finance charge" since this contemplates a "charge" not an amount of credit which is paid to the borrower or on his account. This would indicate that the wording "individually itemized" sandwiched between the reference to all "charges" and that phrase refers only to such charges.

Mullinax v. Aetna Finance Co., CA 19124 (July 25, 1975 N.D.Ga.).

We tend to agree that Judge O'Kelley's interpretation of Regulation Z, § 226.8(d)(1) is more consonant with the literal language of the regulation that is the interpretation made by the district judge in this case. Nevertheless, we affirm the district court's finding of a disclosure violation because the regulation must be read in light of the statute which requires separate disclosure of the amount borrowed. Under 15 U.S.C. § 1639(a) a creditor is required to "disclose each of the following items, to the extent applicable:"

> (1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.
>
> (2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.
>
> (3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

These three subsections of § 1639(a) clearly require the disclosure of three different items. A creditor must

disclose (1) the amount of cash given to the debtor or given on the debtor's behalf, (2) the charges, individually itemized, and (3) the total of the above two amounts. As the disclosure statement makes apparent, General Finance satisfied only the last two subsections of § 1639(a). The statement also informed the debtor that the total amount financed was $171.36. However, the statement failed to disclose that the amount of the loan was $155.28.[4] Although the debtor could have determined the amount of the loan by the simple arithmetic procedure of substracting the total insurance charges from the total amount financed, we determine that the statute does not require a consumer to perform this function, and that the creditor's failure to disclose the required item violated § 1639(a)(1).

Next, we consider whether General Finance failed to properly disclose that appellee's after-acquired property would be subject to appellant's security interest. As we have indicated above, § 226.8(b)(5) requires disclosure of the fact that "after-acquired property *will be* subject to the security interest . . . ." (Emphasis added). Although the appellant concedes that there is a discrepancy between the language of the security agreement (unconditional) and the language in the disclosure statement (conditional), it contends that the conditional language of the disclosure statement accurately reflects the uncertainty surrounding the possibility of obtaining a security interest in after-acquired property. In Georgia, the Uniform Commercial Code has been adopted and §§9-204(3),(4)(b) govern the determination whether after-acquired property is subject to a lender's security interest. Under § 9-204(3), it is stated that "except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure all obligations

[4]Although one of the amounts listed on the statement was $155.28, there was no description indicating what this amount was. We do not believe that this constitutes the meaningful disclosure required by § 1639(a). *See* 15 U.S.C. § 1601.

covered by the security agreement." Subsection (4) states that "no security interest attaches under an after-acquired property clause . . . (b) to consumer goods . . . when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value." The disclosure statement clearly indicated that consumer goods were subject to the security interest. Accordingly, although it is the general rule under subsection (3) that after-acquired collateral will secure present obligations under the security agreement, *consumer goods* acquired after the security agreement was entered into by the parties cannot be made subject to the security interest unless they are acquired within 10 days after the secured party has given value.

We believe that the disclosure statement, although perhaps not false, fails to make a complete disclosure concerning the security interest retained in after-acquired goods, and therefore it did not comply with the futher requirement of the regulation that notice that after-acquired property will be subject to the security interest "shall be clearly set forth in conjunction with the description or identification of the type of the security interest held . . . ." We believe that this portion of the regulation requires a lender to explain the 10 day limitation of UCC 9-204(4)(b) so that the borrower is informed that any consumer goods that he may acquire within 10 days of the loan transaction are subject to the security interest and that any consumer goods acquired after that date are not. Since the lender failed to disclose the nature of the security interest retained in after-acquired property, we determine that General Finance violated § 226.8(b)(5).

Next we consider whether General Finance properly disclosed the fact that future indebtedness would be secured by property described in the security agreement. Athough the security agreement indicated that future indebtedness was secured by the property described in the agreement, the disclosure statement again used

conditional language to indicate that "any chattel . . . which secured this loan *may* secure future . . . indebtedness." This regulation requires disclosure if "future indebtedness is or may be secured by any such [referring to after-acquired] property." The Uniform Commercial Code permits future advances to be secured by items listed in the security agreement (9-204(5)), and does not have a limitation similar to the one concerning after-acquired property.

Again, we believe that the lender failed to follow the mandate of the regulation that notice of the fact that future indebtedness is secured by after-acquired property "shall be clearly set forth in conjunction with the description or identification of the type of security interest held . . . ." The lender should have indicated (1) that a security interest was retained in all consumer goods acquired by the borrower if the goods should be acquired within 10 days of the date that the lender makes the loan and (2) that no security interest was retained in consumer goods acquired after the 10 day period.

In accordance with the above, the judgment of the district court is affirmed.

United States Court of Appeals,
Fifth Circuit.

John C. POLLOCK et al.,
Plaintiffs-Appellees,

v.

GENERAL FINANCE CORPORATION,
Defendant-Appellant.

No. 75-2017.

May 27, 1977.

Appeal from the United States District Court for the Northern District of Georgia.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

In our earlier opinion herein, 535 F.2d 295 (5 Cir. 1976), we affirmed a judgment imposing the minimum statutory penalty of $100.00, together with attorneys' fees, on appellant General Finance Corporation, for three violations of the Truth-in-Lending Act and Regulation Z thereunder, occurring in connection with a loan transaction consummated September 12, 1973. Appellant and amici, including the Federal Reserve Board, now raise a number of issues relating to our decision which deserve an answer but do not, in our opinion, require either reargument or reversal of the judgment below.

Addressing our conclusion that it is a violation of 15 U.S.C. § 1639(a) for a creditor to fail to make a labeled disclosure of the amount of loan proceeds of which the debtor will have actual use, appellant argues, with the help of the Federal Reserve Board, that the Board does not require such disclosure. We held previously that, although Regulation Z § 226.8(d)(1) as promulgated might

appear to support appellant's position, it must be read in the light of § 1639(a),[1] which does include this requirement. The Board contends that it possesses, and has exercised, power to eliminate this particular disclosure requirement, either by virtue of its authority under § 1604 of the Act or in order to resolve a contradiction in the statutory language.

The Board finds a contradiction in § 1639(a) in the fact that subsection (3) thereof requires the disclosure of the sum of the amounts described in (1) and (2). It argues that some of the "charges" required to be disclosed by (2), such as insurance premiums, as here, "could be construed" to be amounts paid "to another person on [the debtor's] behalf" and thus fall within (1). This argument discovers a contradiction where none is necessarily present. In view of the fact that (3) is stated to be the sum of (1) (2), it is more reasonable to construe the disputed language of (1) to refer to consolidation loan payments and the like rather than to incidental charges such as credit insurance, which are covered by (2). Such a construction gives effect to the entire section without the excision of any statutory disclosure requirement.

Under § 1604, the Board's power to make "adjustments and exceptions for any class of transactions" is limited to

[1]"(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

"(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

"(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

"(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2))."

15 U.S.C. § 1639(a)(1), (2) and (3).

efforts "to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." The Board's regulation, sought to be justified by a statutory contradiction that appears to us not to exist, cannot be justified under § 1604. Therefore, we reaffirm our holding that the Act requires that a creditor make a labeled disclosure of actual loan proceeds in accordance with § 1639(a).

Appellant and amici also contend that General Finance Corporation has a good defense under § 1640(f) of the Act, in that it relied in good faith on a Staff Opinion letter issued by an employee of the Board on September 13, 1973,[2] and on the perhaps more natural reading of § 226.8(d)(1). On February 27, 1976, Congress enacted Public Law No. 94222, § 3(d)[3] of which appears to extend the § 1640(f) defense to cover Staff Opinion letters. This enactment occurred several months after briefs were due on this appeal, so we do not find that appellant's assertion of the defense on petition for rehearing was untimely, although we agree with amicus Legal Aid Society of Atlanta that the defense should ordinarily be pleaded specially and proved. We find it reasonable to assume, moreover, that this extended defense is available in any case wherein review is still available, "whether by appeal or otherwise." Section 408(e) of P.L. 93-495 (Oct. 28, 1974), 1974 U.S. Code Cong. & Ad. News, p. 6119. It is not justified by other violations.[4]
might require a remand to the finder of fact, because we conclude *infra* that the penalty imposed in this case was justified by other violations.[4]

[2]This letter is the only concrete evidence predating the subject loan transaction presented by General Finance Corporation in aid of its reliance defense.

[3]See 1976 U.S. Code Cong. & Ad. News, 90 Stat. 198.

[4]The Truth-in-Lending Act does not provide multiple recoveries for multiple violations in one transaction. See 1968 U.S. Code Cong. & Ad. News p. 1976.

Addressing our previous holding that a statement that a security agreement "may" cover after-acquired property does not, without more, fulfill the requirement of § 226.8(b)(5) of Regulation Z, appellant argues that such a statement is sufficient under the interpretation given to the regulation by two very recent Staff Opinion letters. Since neither of these letters antedates the loan agreement in this case, appellant has no colorable reliance defense.

We are mindful that Staff Opinion letters are entitled to weight when the construction of the Board's regulations is at issue. *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974). The force with which these least authoritative pronouncements are allowed to press on the judicial scales, however, must vary with the circumstances of each case.[5] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1943). *General Electric Co. v. Gilbert*, ____ U.S. ____, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). In the present case we are offered two Staff Opinion letters which, far from being contemporaneous with the adoption of § 226.8(b)(5), were in fact procured after the decision of the trial court herein. Furthermore, the views expressed in these letters appear to conflict with the view of the disclosure requirement as to after-acquired property that is manifest in the prior Staff Opinion letter of August 22, 1974. CCH Consumer Credit Service [Par.] 31151. Section 226.8(b)(5) itself uses the word "will" rather than "may," and there is substantial judicial authority for the view that the limitation of Uniform Commercial Code § 9-204(2)(b) must be disclosed. *Woods v. Beneficial Finance Co. of Eugene*, 395 F.Supp. 9 (D.Or. 1975). *Johnson v. Associates Finance*, 369 F.Supp. 1121 (S.D.Ill. 1974). Under these circumstances we decline to give controlling weight to the Staff Opinion letters of December 30, 1975, and May 28, 1976,

[5]We note that the Board pronouncement to which the *Philbeck* court referred for the authority of Staff Opinion letters appears to have been concerned primarily not with construction but with reliance, a matter now dealt with by § 1640(f). 499 F.2d at 979, note 17.

and we affirm our earlier holding as to disclosure of the extent of a security interest in after-acquired property.

We find no merit in appellant's attack on our earlier ruling as it relates to disclosure of a security interest in future indebtedness. However, we correct an error in our previous opinion. We stated therein that the words "such property" in the last sentence of § 226.8(b)(5) of Regulation Z refer to after-acquired property. Closer consideration convinces us, despite the awkward drafting of this sentence, that the proper referent is "property to which the security interest relates," as these words appear in the first sentence of (b)(5).

Except to the extent of this opinion, the petition for rehearing is DENIED and the affirmance of the judgment below remains in effect. No member of this panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C74-551A

JOHN C. POLLOCK and BARBARA POLLOCK

v.

GENERAL FINANCE CORPORATION OF GEORGIA

(Filed March 27, 1975)

ORDER

This truth-in-lending action is presently before the Court for approval of the Recommendations of the Special Master. The Court has read and considered the opinion of Judge Norton, sitting as Special Master, and the defendant's objections to these Recommendations. The Court approves and adopts the Recommendations of the Special Master.

Accordingly, let judgment be entered in favor of the plaintiff for statutory damages of $100 plus reasonable attorney's fees of $400.

SO ORDERED, this 26 day of March, 1975.

Charles A. Moye, Jr.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. C74-551A

JOHN C. POLLOCK and BARBARA POLLOCK

vs.

GENERAL FINANCE CORPORATION OF GEORGIA

(Filed March 27, 1975)

JUDGMENT

This action came on for Consideration before the Court, Honorable Charles A. Moye, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, adopting the Special Master's Recommendations granting plaintiffs' motion for summary judgment.

It is Ordered and Adjudged that judgment be entered in favor of the plaintiffs JOHN C. POLLOCK and BARBARA POLLOCK and against the defendant GENERAL FINANCE CORPORATION OF GEORGIA in the amount of ONE HUNDRED & 00/100 dollars ($100.00) statutory damages, FOUR HUNDRED & 00/100 dollars ($400.00) attorney's fees and costs.

March 27, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. C74-551A

JOHN C. POLLOCK AND BARBARA POLLOCK,
Plaintiffs

v.

GENERAL FINANCE CORPORATION,
Defendant

(Filed March 11, 1975)

RECOMMENDATIONS OF BANKRUPTCY JUDGE
WILLIAM L. NORTON, JR.
SITTING AS SPECIAL MASTER

OPINION

This action was brought by JOHN C. POLLOCK and BARBARA POLLOCK against GENERAL FINANCE CORPORATION on March 27, 1974, based upon a Consumer Credit Transaction entered into between the parties on September 12, 1973. Responsive pleadings were filed by the Defendant and the case was set for a preliminary conference before this Court on May 23, 1974. At that conference, the Plaintiffs set out three (3) separate allegations of violations on behalf of the Defendant and the Plaintiffs subsequently filed their Motion for Summary Judgment on or about August 9, 1974, and the matter is now before the Court for determination of the issues.

(1) The Plaintiffs argue that in a "closed end" loan transaction, Section 129(a)(1) of the Act, (15 U.S.C. 1639(a)(1)) and Regulation Z 226.8(d)(1) require individual itemization of all elements included in the amount financed. Regulation Z 226.8(d)(1), in defining "amount financed", requires disclosures of

(t)he amount of credit . . . which will be paid to the customer or for his account or to another person on his behalf, including all charges, *individually itemized*, which are *included in the amount of credit extended* but which are not a part of the finance charge, using the term, "amount financed." (Italics supplied).

The disclosure statement furnished Plaintiffs discloses the "amount financed" as $171.36. Plaintiffs argue that although there are three charges disclosed on two different lines of the disclosure statement that total $171.36 (credit life $3.84; credit disability, $12.24; and an unlabeled charge of $155.28), that only after checking with the Defendant following the pretrial conference was it determined that the $155.28 amount was the amount of a check given Plaintiffs as loan proceeds, and, therefore, a part of the amount financed.

Defendant argues that the amount received is not a "charge"; that it is the amount of cash received; that it need not be itemized as "amount received". The Court finds that such ingredients of the "amount financed" required to be itemized do not have to be "charges" as used in said Sec. 226.8(d)(1). All parts of "amount financed", i.e., the amount of the credit which is paid to the customer *and* "all charges", which are included in the amount of credit extended, but not a part of the finance charge, must be individually itemized and labeled to show the borrower what they are.

Plaintiffs contend that the $155.28, the amount of cash received, must be labeled in some manner so as to indicate to Plaintiffs what the charge is for, as required by 15 U.S.C. 1601 (Section 102) of the Act, which expresses the general purpose of the Act to be to provide "meaningful" disclosures; that the Plaintiffs are thereby unable "to compare the various credit terms available to (them) and avoid the uninformed use of credit" as expected by 15 U.S.C. 1601.

Defendant admits that it might be better if creditor had labeled the $155.28 as the amount of the check or cash received by borrower; but that such labeling is not required by the Act or Regulation Z. Defendant argues that it is obvious to a borrower on inspection of the disclosure statement what it represents; that is, the cash proceeds received by the borrower from the proceeds of the loan.

The Court finds no violation in Sec. 102 since said section, being preamble only, merely sets the tone of the Act. But the disclosure provisions must be construed with the purpose of the Act as stated in Sec. 102 always in mind.* It appears to this Court that this unlabeled amount of $155.28 represents "a part of the credit extended"—(the cash-received part)—which "is paid to the customer" and is required by Section 226.8(d)(1) to be itemized as a part of the "amount financed". Said sum, therefore, must be itemized along with the other itemized parts comprising the "amounts financed". Failure to so itemize constitutes a disclosure violation.

(2) Plaintiffs' argument concerning the disclosure of the term of credit life and disability insurances on the disclosure statement has been determined by *Philbeck v. Timmers Chevrolet, Inc., et al.*, 499 F.2d 971 (CA5) (August 1974). The failure here to include such premiums in the finance charge is not a violation of the Act.

(3) As an additional violation, the Plaintiffs allege that the Defendant has failed to properly disclose that

(a) Plaintiffs' after-acquired property will be subject to Defendant's security interest, and

(b) that Plaintiffs' future indebtedness to Defendant will also be secured.

**See Robert P. McDaniel v. The Fulton National Bank of Atlanta*, C.A. C74-244A at pp. 6-8 (N.D. Ga., Sept. 19, 1974) (Recommendations of Bankruptcy Judge William L. Norton, Jr. Sitting as Special Master); *Jettie Ivey v. Atlanta Gas Light Co.*, C.A. C74-521A at pp. 11-14 (N.D. Ga., Nov. 11, 1974) (Recommendations of Bankruptcy Judge William L. Norton, Jr. Sitting as Special Master).

Regulation Z 226.8(b)(5) requires that a creditor describe or identify the type of security interest held, and that such security interest clearly identify the property which it relates. In addition,

> (i)f *after-acquired property will* be subject to the security interest, or if other or *future indebtedness is* or *may* be secured by any such property this fact shall be clearly set forth . . . (Italics supplied). Regulation Z 226.8(b)(5).

(a) *After-acquired Property.* On the disclosure statement furnished Plaintiffs, there are two disclosures dealing with security interests. In the disclosures at the top of Exhibit A, a box titled "security interest" has the word "yes" typed in. Immediately above the promissory note on the disclosure statement a disclosure titled "SECURITY" is set forth, which reads as follows, in part:

> SECURITY . . . If "YES" appears under "Security Interest" above, there is a Security Agreement on household and consumer goods belonging to Borrowers and located at their address stated above and on any property listed below . . . The Security Agreement *may* cover after-acquired property. Any chattel or real property which secured this loan *may* secure future or other indebtedness. (Italics supplied).

On the Security Agreement, however, under the heading, "DESCRIPTION OF SECURED PROPERTY," the following is set forth:

> All of the household and consumer goods . . . now or hereafter located in or about the premises constituting the Debtor's residence at their address above set forth or at any other address to which the same shall be removed . . .

It is apparent from the "now or hereafter located" language in the Security Agreement that after-acquired property will be subject to the security interest. This, of course, is more positive than the term "may" used in the disclosure statement which provides, "The Security Agreement *may* cover after-acquired property." (Italics supplied).

Section 226.8(b)(5) provides: "If after-acquired property *will* be subject to the security interest . . . this fact shall be clearly set forth . . ." (Italics supplied).

Disclosure that after-acquired property *may* be subject to the security interest, when, in fact such after-acquired property *is* subject, is inadequate. Failure here to disclose that after-acquire property *will* be subject to the security interest is a violation of the Act. Regulation Z 226.8(b)(5).

(b) *Future Indebtedness.* As quoted in section (3)(a) hereof, the disclosure statement provides that "(a)ny chattel or real property which secured this loan *may* secure future of other indebtedness." (Italics supplied).

Thus, Defendant has a security interest in Plaintiffs' household and consumer goods, and, according to the disclosure statement, it *may* secure future indebtedness.

Regulation Z 226.8(b)(5) provides "if other or future indebtedness *is* or *may* be secured by any such property this fact shall be clearly set forth" . . . (Italics supplied).

The disclosure statement providing that possible future indebtedness *may* be secured by Plaintiffs' household and consumer goods clearly sets forth that fact of possibility and seems to comply with the Act. Apparently a disclosure satisfies Section 226.8(b)(5) if it clearly discloses to the borrower that a security agreement does secure or *may* secure any future indebtedness.

Plaintiffs, however, further argue that the fact that the Security Agreement more positively provides that future indebtedness *is* secured by the Security Agreement, rather than the *"may"* disclosure in the disclosure statement, renders the disclosure erroneous under Section 226.8(b)(5).

The Security Agreement furnished Plaintiffs provides immediately below the typed in disclosures that "this Security Agreement secures future advances as provided

below." Below, in the [illegible]ird paragraph of the Security Agreement, the following language is set forth:

> This Security Agreement is given to secure payment of said note and *any note or notes executed and delivered to Secured Party by Debtor at any time before the entire indebtedness secured hereby shall be paid in full.* (Italics supplied).

The Security Agreement is not conditional with respect to fact that the security attaches to any future indebtedness. It is positive that any future note executed before this debt is paid shall be covered by this security. The Security Agreement is broader than the term "may" used in the disclosure statement. Therefore, the disclosure statement using the conditional "may" is contrary to the Security Agreement and does not disclose the true fact that the security given here does secure future indebtedness. The disclosure statement, being erroneous as to this fact, violates Sec. 226.8(b)(5).

The Defendant having violated the Act, the Plaintiffs' Motion for Summary Judgment should be granted and damages of twice the amount of the finance charge should be awarded to Plaintiffs. The finance charge was disclosed on the disclosure statement as $32.64. Thus, Plaintiffs are entitled to the minimum statutory damages of $100.00.

Plaintiffs' counsel has submitted an affidavit dealing with the number of hours spent on this civil action. Based on said affidavit, this Court recommends that Plaintiffs' counsel be awarded <u>$400.00</u> as reasonable attorney's fees. Defendant may file objections to this recommendation within ten (10) days from the date of these Recommendations.

This 28th day of February, 1975.

WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE SITTING
AS SPECIAL MASTER

STATUTUES AND REGULATIONS INVOLVED

15 U.S.C. § 1601

(a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1604

The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1605

* * *

(b) Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with

the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

(c) Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

(d) If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charge with respect to that transaction:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise by payable.

(3) Taxes.

(4) Any other type of charge which is not for credit and the exclusion of which from the finance charge is approved by the Board by regulation.

(e) The following items, when charged in connection with any extension of credit secured by an interest in real property, shall not be included in the computation of the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, title insurance, or similar purposes.

(2) Fees for preparation of a deed, settlement statement, or other documents.

(3) Escrows for future payments of taxes and insurance.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

15 U.S.C. § 1610

(a) This title does not annul, alter, or affect, or exempt any creditor for complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of the inconsistency.

15 U.S.C. § 1631

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended the information required under this chapter or chapter 4.

15 U.S.C. § 1639

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

* * *

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

U.S.C. § 1640

* * *

(f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

12 C.F.R. § 226.1

* * *

(a)(2) This Part implements the Act, the purpose of which is to assure that every customer who has need for consumer credit is given meaningful information with respect to the cost of that credit which, in most cases, must be expressed in the dollar amount of finance charge, and as an annual percentage rate computed on the unpaid balance of the amount financed. Other relevant credit information must also be disclosed so that the customer may readily compare the various credit terms available to him from different sources and avoid the uninformed use of credit. This Part also implements the provision of the Act under which a customer has a right in certain circumstances to cancel a credit transaction which

involves a lien on his residence. Advertising of consumer credit and consumer lease terms must comply with specific requirements and certain credit terms may not be advertised unless the creditor usually and customarily extends such terms. This Part also contains prohibitions against the issuance of unsolicited credit cards and limits on the cardholder's liability for unauthorized use of a credit card. In addition, this Part is designed to assist the customer to resolve credit billing disputes in a fair and timely manner, to regulate certain billing and credit card practices, and to strengthen the legal rights of consumers. This Part is also designed to assure that lessees of personal property are given meaningful disclosures of lease terms, to delimit the ultimate liability of lessees in leasing personal property and to require meaningful and accurate disclosures of lease terms in advertisements. Neither the Act nor this Part is intended to control charges for consumer credit, or interfere with trade practices except to the extent that such practices may be inconsistent with the purpose of the Act.

12 C.F.R. § 226.4

* * *

(a)(6) Charges or premiums for insurance, written in connection with any credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, unless a clear, conspicuous, and specific statement in writing is furnished by the creditor to the customer setting forth the cost of the insurance if obtained from or through the creditor and stating that the customer may choose the person through which the insurance is to be obtained.

(7) Premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or other credit loss.

12C.F.R. § 226.4

* * *

(b) **Itemized charges excludable.** If itemized and disclosed to the customer, any charges of the following

types need not be included in the finance charge:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in subparagraph (1) of this paragraph which would otherwise be payable.

(3) Taxes not included in the cash price.

(4) License, certificate of title, and registration fees imposed by law.

(c) **Late payment, delinquency, default, and reinstatement charges.** A late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence.

(d) **Overdraft charges.** A charge imposed by a bank for paying checks which overdraw or increase an overdraft in a checking account is not a finance charge unless the payment of such checks and the imposition of such finance charge were previously agreed upon in writing.

(e) **Excludable charges, real property transactions.** The following charges in connection with any real property transaction, provided they are bona fide, reasonable in amount, and not for the purpose of circumvention or evasion of this Part, shall not be included in the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, abstract of title, title insurance, or similar purposes and for required related property surveys.

(2) Fees for preparation of deeds, settlement statements, or other documents.

(3) Amounts required to be placed or paid into an escrow or trustee account for future payments of taxes, insurance, and water, sewer, and land rents.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

12 C.F.R. § 226.6

* * *

(c) **Additional information.** At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required by this Part to be disclosed. Any creditor or lessor who elects to make disclosures specified in any provision of State law which, under paragraph (b) of this section, is inconsistent with the requirements of the Act and this Part may

(1) Make such inconsistent disclosures on a separate paper apart from the disclosures made pursuant to this Part, or

(2) Make such inconsistent disclosures on the same statement on which disclosures required by this Part are made; provided:

(i) All disclosures required by this Part appear separately and above any other disclosures,

(ii) Disclosures required by this Part are identified by a clear and conspicuous heading indicating that they are made in compliance with Federal law, and

(iii) All inconsistent disclosures appear separately and below a conspicuous demarcation line, and are identified by a clear and conspicuous heading indicating that the statements made thereafter are inconsistent with the disclosure requirements of the Federal Truth in Lending Act or the Federal Consumer Leasing Act.

12 C.F.R. § 226.8

* * *

(b) **Disclosures in sales and non-sale credit.** In any transaction subject to this section, the following items, as applicable, shall be disclosed:

* * *

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

12 C.F.R. § 226.8

* * *

(d) **Loans and other nonsale credit.** In the case of a loan or extension of credit which is not a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the

customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

GA. CODE ANN. § 109A-9-204

When security interest attaches; after-acquired property; future advances

* * *

(4) No security interests attaches under an after-acquired property clause

* * *

(b) to consumer goods other than accessions (109A-9—314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

(5) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

FEDERAL RESERVE BOARD STAFF INTERPRETATIONS

NO. 271

We are pleased to respond to the specific questions raised in your letter of December 24, 1969, regarding the proposed Truth in Lending statement and promissory note to be used by the * * *.

With respect to the credit life insurance authorization, it is our opinion that the provisions of Section 226.4(a)(5)-(ii) require that the premium be disclosed in the authorization itself, and that the authorization is deficient if it simply refers to the amount of the premium disclosed elsewhere.

You are correct that Section 226.8(d)(1) does not require an itemization of the amount of money payable to other creditors as the result of a consolidation loan or the amount of money allocated to the debtor's old balance in the event an outstanding loan is rewritten or otherwise refinanced. That section applies only to charges which may be incurred in connection with the loan that are not a part of the finance charge.

Section 226.8(b)(7) of Regulation Z requires that creditors disclose the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation. This requirement deals only with identification of the method of computing any rebate and does not prescribe that the procedures used in determining such rebate must also be disclosed. In most instances, reference to commonly known methods such as the "Rule of 78's" "Straight Line Method" or "Pro Rata" would be sufficient. It would seem to be preferable to include reference to the Rule of 78's in your disclosure form, since you indicate that that is basically what the statutes of Nebraska require. We do not believe, however, that mere reference to the specific statute in which the rebate formula can be found would be sufficient to comply with Section 226.8(b)(7).

Excerpts from FRB Letter of March 6, 1970, No. 271, by Kenneth A. Kenyon, Deputy Secretary.

NO. 444

This is in reply to your letter * * * requesting the Board to indicate that a * * * staff letter on Regulation Z, Truth in Lending, represents the position of the Board of Governors.

A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take it they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide opinions on regulatory provisions, an essential part of its operations.

It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board.

Excerpts from FRB Letter of March 1, 1971, No. 444, by Kenneth A. Kenyon, Deputy Secretary.

NO. 509

With decreases in money rates, you are considering reducing the interest rate on outstanding home mortgage loans. The reduced rate would continue as long as money rates continue at the lower level. If the rates increase, you intend to return the mortgage rate to a point at or below the initial contract rate. While no disclosures under

Regulation Z are necessary to reflect the initial reduction of the rate, you are concerned about their being required upon any possible subsequent increase.

It is the staff's view that when a rate is increased, even though returned to the original rate disclosed, § 226.8(j) of Regulation Z would apply and new disclosures would be required. In view of the period of a reduction in rate, the original disclosures would no longer be accurate. Furthermore, the new disclosures would be relatively simple to make, and would consist primarily of the new APR (which should be simply the new interest rate where there are no new charges), the unpaid balance ("amount financed"), the number, frequency and amount of remaining payments, the security, and the insurance disclosures. Delinquency and prepayment provisions would also have to be disclosed, but normally could be preprinted on the form. Furthermore, the exclusions from showing the "total of payments" and "finance charge" for first purchase money mortgages would be applicable to this type of refinancing of a first purchase money mortgage. In addition, the right of rescission would not be applicable. (See interpretation § 226.903.) In short, the prospect of new disclosures if the rate is increased should not discourage any reduction at this time.

It might be noted that if the mortgage calls for variable interest rates, and disclosures were made in accordance with interpretation § 226.810, then the annual percentage rate could be raised or lowered under the conditions specified in the original disclosure without making further disclosures.

With reference to your inquiry about the need to list all corporate securities securing a demand note when the rate is increased, it is the staff's view that the requirements of § 226.8(b)(5) for this type of frequently

changed and basically commercial security can be met simply by identifying the property as "common stock" or similar descriptive terminology. It would not be necessary to list each and every individual security. With reference to the general problem of frequent disclosures on demand obligations tied to an increasing prime rate, these obligations would appear to lend themselves to the variable rate disclosures described in interpretation § 226.810, which would obviate the need for any disclosures when the rate is increased or decreased. Problems of negotiability would probably be overcome if the variable disclosures are not incorporated into the note, but are made on a separate statement.

Your second question concerns the disclosure responsibilities of a lending institution when it reduces interest rates on outstanding first mortgage loans (perhaps on a permanent basis), and charges a service charge of one percent. Interpretation § 226.817 provides that if no other credit terms are changed, a reduction in the annual percentage rate does not constitute a new transaction requiring new disclosures. In the staff's view, imposition of a service charge is a change in the credit terms of the type contemplated in § 226.817 which would make § 226.817 inapplicable, and would require a new disclosure statement. However, as in the case of the prior question, under the provisions of § 226.903 the right of rescission would not be available, and the creditor would not need to disclose the "total of payments" or "finance charge" under the exclusion in § 226.8(b)(3).

Excerpts from FRB Letter of July 30, 1971, *No.* 509, *by Frederic Solomon, Director.*

NO. 521

This is in [regards to] the disclosure of a security interest in household goods and other personal property under Regulation Z.

The intent of § 226.8(b)(5) of Regulation Z is that the customer should be provided a disclosure of the security interest taken as a result of the consumer credit transaction. It is staff's opinion that disclosing to the customer the fact that a security interest will be taken on his household goods and other personal property is adequate to meet the provisions of § 226.8(b)(5), without listing each item. We believe that to require such a listing would be extremely burdensome to creditors. We understand that in many jurisdictions, it is not necessary to have a detailed listing in order to perfect a lien on household goods and other personal property.

Consequently, we believe that the device of using a box (to be marked only if the borrower's household goods and personal property are not to be collateralized), would be acceptable under Regulation Z.

Excerpts from FRB Letter of August 26, 1971, *No.* 521, *by Griffith L. Garwood, Chief, Truth in Lending Section.*

NO. 983

This is in response to your letter * * * and your previous correspondence concerning Public Information Letter 829. Specifically, you question the conclusions stated in that letter as to the proper disclosure of a security interest in after-acquired property under § 226.8(b)(5) of Regulation Z.

Letter 829 addressed the situation in which a creditor discloses a security interest in *all* after-acquired property when the relevant State law only permits the acquisition of a security interest in those consumer goods in which the debtor acquires rights within 10 days after the secured party gives value. This limitation is found in § 9-204 of the Uniform Commercial Code, which is in effect in 49 states. The inquiring creditor had based this disclosure on the security interest description contained in Exhibit E of the Board's pamphlet *What You Ought to Know About Truth*

in Lending and questioned whether reliance on the form would constitute a defense against civil liability under section 130(c) of the Act. Staff's response indicated that the description of the security interest must accurately reflect the type of security interest that may be validly acquired under State law, in order to comply with § 226.8(b)(5). Letter 829 has been interpreted to require that the 10-day limitation on after-acquired property be included in the security interest disclosure under that section.

Upon further consideration of that letter, staff believes that, to the extent that it would require a creditor to disclose limitations on after-acquired property, Letter 829 should be modified. In staff's opinion, it would be sufficient, in disclosing an after-acquired property clause under § 226.8(b)(5), to state simply that the security interest covered such property, without further describing the manner and conditions under which the interest attaches. We believe that this would comply with the relevant provisions in that section, which requires the creditor to clearly set forth the *fact* that after-acquired property will be subject to the security interest.

It must be emphasized, however, that staff's position on this issue rests not on Exhibit E of the pamphlet but on Regulation Z itself. As indicated in Letter 829, we do not believe that a creditor can automatically comply with the Regulation by using a sample form, regardless of whether the terms of the creditor's own credit plan coincide with those described in that form. For example, if a creditor discloses that the Rule of 78's will be used to compute finance charge rebates and State law does not permit the use of that rebate method in that type of credit transaction, this disclosure would clearly violate § 226.8(b)(7), despite the fact that the creditor's disclosure exactly mirrors the language of Exhibit E.

Thus, we believe that Letter 829 is correct in stating that the forms found in the pamphlet are "not necessarily definitive or accurate for every credit transaction." Creditors must consider their own particular credit plans in light of the requirements of Regulation Z and design their disclosures accordingly.

Excerpts from FRB Letter of December 30, 1975, No. 983, by Jerauld C. Kluckman, Assistant Director.

NO. 1053

This is in response to your letter * * * regarding our previous correspondence on disclosure of a security interest in after-acquired property under § 226.8(b)(5) of Regulation Z.

In staff's letter of January 9, we indicated that a creditor need not state the conditions or limitations imposed by State law in the disclosure of a security interest in after-acquired property under § 226.8(b)(5). Specifically, it would not be necessary for a creditor to provide a statement of the effect of § 9-204 of the Uniform Commercial Code on security interests in after-acquired property.

You state that certain retail instalment contracts indicate that the creditor is reserving an interest in all after-acquired property including all attachments, substitutions, and replacements, without any indication of the limitations imposed by § 9-204. You ask whether this would constitute a violation of either § 226.6(c) or § 226.8(b)(5) of the Regulations.

It appears from your letter that these creditors are disclosing a security interest in "all after-acquired property" or "all after-acquired property including all attachments, substitutions, and replacements." If, in fact, the applicable State law only permits acquisition of a security interest in after-acquired property acquired within a certain period of time, then such a statement would be improper under Regulation Z. As our previous

letter indicates, a simple disclosure of the fact that after-acquired property may be subject to the security interest would be sufficient to comply with the clear language of § 226.8(b)(5), without an explanation of the various conditions and limitations on such interests which may be imposed by the applicable State law. However, the fact that the creditor need not disclose such limitations and conditions does not mean that the creditor may affirmatively misstate the scope of the security interest, in disregard of those limitations. If, in fact, the creditor discloses an interest in *"all* after-acquired property," when the interest would actually attach only to property acquired by the borrower within a certain period of time, such a disclosure would be inaccurate and misleading in violation of Regulation Z.

Excerpts from FRB Letter of May 28, 1976, *No.* 1053, *by Jerauld C. Kluckman, Assistant Director.*

NO. FC-0023

This is in response to your letter * * * requesting an official interpretation on the disclosure of the type of a security interest under § 226.8(b)(5) of Regulation Z.

Section 226.8(b)(5) of Regulation Z requires the creditor to disclose, among other things, the "type of any security interest held or to be retained or acquired by the creditor." You submit three phrases which are intended to describe the type of a security interest taken by the creditor and request staff's opinion as to whether each of these phrases constitutes a sufficient description of the security interest under § 226.8(b)(5).

First, you ask whether the disclosure of a "security interest under the Uniform Commercial Code" is a sufficient description when the creditor obtains a security interest subject to the UCC. In staff's opinion, this language would be sufficient to comply with that requirement of § 226.8(b)(5) in the situation you describe. Staff believes that this provision of the Regulation does

not require creditors to provide a detailed statement of the type of interest acquired or a citation to any specific statutory provision pursuant to which the security interest is obtained. In staff's view, a security interest under the Uniform Commercial Code is a "type" of security interest and may be adequately described using the language you suggest.

Additionally, you ask whether a concensual or contractual security interest may be disclosed in language such as the following: "a security interest established by our contract" or "a security interest through our agreement." In staff's opinion, this language does not adequately describe the type of security interest taken, pursuant to § 226.8(b)(5). The words "contract" and "our agreement" may not convey any particular meaning to the customer or assist him in identifying the legal document from which the security interest arises. However, if the language you propose could be modified to more specifically identify the contract or agreement referred to, staff believes that such a disclosure would adequately describe the type of security interest involved. For example, the statement might refer to the specific title of the document which evidences the security interest.

This is an official staff interpretation of Regulation Z issued pursuant to § 226.1(d)(3) of the Regulation. Staff's conclusions relate solely to the facts and issues presented.

FRB Official Staff Interpretation, November 22, 1976, *effective November* 30, 1976, *No.* FC-0023, 41 *F.R.* 52980, *by Jerauld C. Kluckman, Assistant Director.*

CONTRACT AND SECURITY AGREEMENT ON WHICH THE ACTION WAS BASED

Home of friendly Bob Adams service

LOAN NUMBER 11992-0

Note and Disclosures Required by Federal and State Law.

GENERAL FINANCE CORPORATION
OF GEORGIA
816 GORDON STREET, S.W.
ATLANTA, GEORGIA 30310
PHONE 758-7226

32-0227

BORROWER'S (NAMES, ADDRESSES & SOCIAL SECURITY NUMBERS)

Y 12 V

POLLOCK, JOHN C & BARBARA
E523 CLEMENT DR S W
ATLANTA GA 30331

23 260 65 6101

AUTHORIZED INSURANCE COVERAGE:
- [ ] Single Decreasing Credit Life
- [x] Single Level Term Credit Life
- [x] Disability Insurance With 3 Day Retroactive Waiting Period
- [ ] Disability Insurance With 7 Day Retroactive Waiting Period
- [ ] Auto Physical Damage Insurance

				APD DEDUCTIBLE COLL. $	COMP. $	COST OF AUTO PHYSICAL DAMAGE INSURANCE $		
DATE 09/12/73	FIRST INSTALLMENT DUE DATE 10/12/73	OTHERS: SAME DAY EACH MONTH	FINAL INSTALLMENT DUE DATE 09/12/74	INSTALLMENTS FIRST $ 17.00		OTHERS $ 17.00	INTEREST BEGINS 9/12/73	
TOTAL OF PAYMENTS $ 204.00	INTEREST CHARGE $ 16.32	TOT. LOAN FEES $ 16.32	AMOUNT FINANCED $ 171.36	CREDIT INSURANCE CHARGES LIFE $ 5.84	DISABILITY $ 12.24		331	
TOTAL AMOUNT PAYABLE IN 12 MONTHLY INSTALLMENTS		155.28	OFFICIAL FEES $ NONE NONE	FINANCE CHARGE $ 32.64		ANNUAL PERCENTAGE RATE 33.475 %	SECURITY INTEREST YES	REAL ESTATE DEED
TOTAL LOAN FEE BREAKDOWN	FEES 16.32	NONE	NOTE LOAN	FINANCE CHARGE		ANNUAL PERCENTAGE RATE		

(1) CREDIT LIFE OR DISABILITY INSURANCE is not required to obtain this loan. If borrowers desire credit life insurance or credit life and disability insurance, the charge(s) therefor stated above will be deducted from the Amount Financed and the insurance covers the borrower named in the certificate(s) of insurance delivered herewith. No charge is made for credit insurance and no credit insurance is provided unless one of the borrowers signs the appropriate statement below:

I Desire Level Term Credit Life Insurance. 9-12-73

Borrower's Signature Date

I Desire Decreasing Term Credit Life Insurance.

Borrower's Signature Date

I Desire Credit Disability Insurance. I understand that such disability benefits will be payable to the Lender above named as its interest may appear in the event I am disabled and my disability continues for more than THREE days.

Borrower's Signature Date

(2) You have the right to choose the person through whom any Auto physical damage insurance is to be obtained. If Borrower desires Lender to obtain Auto Physical Damage insurance the cost is stated above.

Borrower hereby authorizes Lender to obtain Auto physical damage insurance and deduct the premium therefor from the above described Loan, and acknowledges receipt of a copy of the separate disclosure of the terms of such insurance, bearing even date herewith:

Borrower's Signature Date

TOTAL OF PAYMENTS is the Amount Financed plus the Finance Charge and is the amount required for payment according to schedule.

AMOUNT FINANCED includes any Official Fees and any charge for credit life and/or disability insurance and auto physical damage insurance, and is Principal Amount of Loan.

OFFICIAL FEES are paid to public officials for perfecting or releasing security.

11/5/73

FINANCE CHARGE – ANNUAL PERCENTAGE RATE. The Finance Charge is the sum of the Interest and Loan Fees and is computed for the full term of the contract. The Finance Charge is subject to delinquency charges, and the Interest portion thereof is subject to prepayment in full. The computation of the Finance Charge and delinquency charge is made in accordance with Sections 15(a), (b) and (d) of the Georgia Industrial Loan Act, printed on the reverse side hereof. The Annual Percentage Rate, if computed by the actuarial method for payment according to schedule, would yield the Finance Charge, but it is not the contract rate of charge.

691-0458 0 ----- H. T NONE

PREPAYMENT REFUND. Borrower may prepay the loan in full or part at any time. If prepaid in full before maturity, a portion of the Interest will be refunded in an amount equal to that proportion of the Interest which the sum of the monthly balances scheduled to follow the date of prepayment in full bears to the sum of all the monthly balances provided for in the original contract. The Loan Fees are fully earned at the time the loan is made and are not subject to prepayment refunds. No refund of Interest of less than $1.00 will be made; all in accordance with Section 17 of the Georgia Industrial Loan Act, printed on the reverse side hereof.

DELINQUENCY CHARGES: A delinquency charge of 5¢ for each $1.00 of any installment 5 days or more in default may be collected, provided that this charge may not be collected more than once for the same default.

SECURITY. This loan is secured by this note and any credit life and/or disability insurance and auto physical damage insurance for which a charge is made as stated above. If "YES" appears under "Security Interest" above, there is a Security Agreement on household and consumer goods belonging to Borrowers and located at their address stated above, and on any property listed below. If "YES" appears under "Real Estate Deed" above, a deed has been taken to the real estate belonging to Borrowers located at their address stated above unless a different address is stated below. The Security Agreement may cover after-acquired property. Any chattel or real property which secures this loan may secure future or other indebtedness.

Make	Model	Identification No.	Type	Year

IN CONSIDERATION OF THE ABOVE DESCRIBED LOAN made by the above named corporation, the undersigned, jointly and severally, promise to pay to the order of said corporation at its above office the Total of Payments of this note in installments of the amounts and upon the dates shown above with all costs of collection, including fifteen (15%) per cent of the total amount of unpaid indebtedness for attorney's fees if collected by law or through an attorney at law and also any delinquency charges due hereon. Failure to pay any installment promptly when due, time being of the essence of this contract, shall, at the option of the holder hereof, without notice or demand, render all remaining installments due and payable. The undersigned agrees to pay interest after the maturity date hereof at the rate of eight (8%) per cent per annum.

Payment shall be made in consecutive monthly installments as above indicated beginning on the stated due date for the first installment. When the holder's office is not open for business on a stated due date, that due date shall be the next succeeding business day. Default may be discussed with any present or future employer.

Each of the undersigned, whether Principal, Surety, Endorser, Guarantor, or other party hereto, hereby severally waives and renounces, each for himself and family, any and all homestead or exemption rights either of us may have under or by virtue of the Constitution or Laws of Georgia, any other State, or the United States, as against this debt or any renewal thereof; and the undersigned, and each Surety, Endorser, Guarantor or other party to this note, transfers, conveys and assigns to the Holder hereof, a sufficient amount of any homestead or exemption as may be set apart in bankruptcy, to pay this note in full, with all costs of collection; and each further waives demand, protest and notice of demand, protest and non-payment. Each of us further agrees that this note or any installment may be renewed or extended and any security may be released or substituted without notice to us and without affecting our liability.

Payment in advance may be made in any amount. The undersigned agree that should the Holder accept a partial payment hereon the remaining portion of the payment or payments due is not waived, and may be collected at any future time. The Holder shall have the right to accept smaller payments at its option. Failure of the Holder to exercise any of its rights hereunder shall not constitute a waiver thereof.

If any of the undersigned is a married woman, she represents and warrants that this instrument has been executed in her behalf, and for her sole and separate use and benefit and that she has not executed the same as surety for another, but that she is the Borrower hereunder. The undersigned jointly and severally represent and warrant that each of them is at least twenty-one years of age, and laboring under no disability to contract, and that none of them contemplates making application for a homestead or for adjudication as bankrupty, and that none of them contemplates moving from its present address, and that each is solvent.

This agreement shall inure to and be binding upon the several respective legal representatives, successors, heirs, and assigns of the parties hereto. The construction, validity, and effect hereof shall be governed by the laws of Georgia, except as modified by the Federal Consumer Credit Protection Act.

BORROWERS ACKNOWLEDGE RECEIPT OF AN EXACT AND COMPLETELY FILLED IN COPY OF THIS DOCUMENT AND CERTIFICATES EVIDENCING ANY REQUESTED INSURANCE.

Witness the hands and seals of the undersigned, this 12TH day of SEPT. 19 73

Mrs. Barbara Pollock (SEAL)

WITNESSES: J B Hanna (SEAL)

Charlene (SEAL)

SECTIONS 15(a), (b) AND (d) OF THE GEORGIA INDUSTRIAL LOAN ACT:

Maximum Rate of Charge. Every licensee hereunder may loan any sum of money not exceeding $2,500.00 for a period of two years or less, and may charge, contract for, collect and receive interest, and fees and may require the fulfillment of conditions on such loans as hereinafter provided:

(a) Charge, contract for, receive and collect interest at a rate not to exceed 8 Per Cent per annum of the face amount of the contract, whether repayable in one single payment or repayable in monthly or other periodic installments. On loan contracts repayable in 18 months or less, the interest may be discounted in advance, and on contracts repayable over a greater period, the interest shall be added to the principal amount of the loan. On all contracts, interest or discount shall be computed proportionately on equal calendar months.

(b) In addition thereto, charge, contract for, receive or collect at the time the loan is made, a fee in an amount not greater than 8 percent of the first $600.00 of the face amount of the contract, plus 4 percent of the excess; provided, however, that such fee shall not be charged or collected on that part of a loan which is used to pay or apply on a prior loan, or installment of a prior loan from the same licensee to the same borrower made within the immediately preceding 6 months period; provided, however, if the loan balance is $100.00 or less, the said period shall be 2 months, not 6 months; provided, further, that nothing contained in Subsections 15 (a) and 15 (b) shall be construed to permit charges, interest of fees of any nature whatsoever in the aggregate in excess of the charges, interest, and fees which would constitute a violation of Section 57-117 of the Code of Georgia of 1933 and the repeals hereinafter set forth in this Act shall in no wise affect Section 57-117 and Section 57-9901 of the Code of Georgia of 1933. If a borrower prepays his entire loan to a licensee and within the following 15 days make a new loan with that licensee, (and if this is done within the 6 months period or the 2 months period above described, as may be applicable), the fee may be charged only on the excess by which the face amount of the new contract exceeds the amount which the borrower repaid to that licensee within the said 15-day period.

(d) Charge and collect from the borrowers a late or delinquent charge in an amount equal to 5 cents for each $1.00 of any installment which is not paid within 5 days from the date such payment is due, provided that this late or delinquent charge shall not be collected more than once for the same default.

SECTION 17 OF THE GEORGIA INDUSTRIAL LOAN ACT

REFUNDS. Notwithstanding the provisions of any contract to the contrary, a borrower may at any time prepay all or any part of the unpaid balance to become payable under any installment contract. If the borrower pays the time balance in full before maturity, the licensee shall refund to him a portion of the prepaid interest, calculated in complete even months (odd days omitted); as follows: The amount of the refund shall represent at least as great a portion of the total interest as the sum of the periodical time balance after the date of prepayment bears to the sum of all periodical time balances under the schedule of payments in the original contract. Where the amount of the refund due to anticipation of payment is less than $1.00 no refund need be made. Provided, further, that if the borrower has been required to purchase other than insurance coverage in a blanket policy when he has paid no acquisition cost, he shall have the option to continue such insurance in force for the balance of the policy period, with all rights transferred to the borrower or his assigns, in which event no refund of insurance premiums shall be made to him.

HOME OF friendly BOB ADAMS service

SECURITY AGREEMENT

GENERAL FINANCE CORPORATION
OF GEORGIA
815 GORDON STREET, S.W.
ATLANTA, GEORGIA 30310
32-0227 PHONE 758-7226

LOAN NUMBER

DEBTOR'S (NAMES, ADDRESSES & SOCIAL SECURITY NUMBERS)

POLLOCK, JOHN C & BARBARA
[illegible] CLEMENT [illegible]
ATLANTA GA [illegible]

28 260 66 6191

				APD DEDUCTIBLE COLL. $	COMP. $	COST OF AUTO PHYSICAL DAMAGE INSURANCE $
DATE [illegible]	FIRST INSTALLMENT DUE DATE [illegible]	OTHERS: SAME DAY EACH MONTH	FINAL INSTALLMENT DUE DATE [illegible]	INSTALLMENTS FIRST 17.[illegible] $	OTHERS [illegible] $	INTEREST BEGINS 9/12/73
TOTAL OF PAYMENTS $ [illegible]	INTEREST CHARGE $ [illegible]	TOT. LOAN FEES $ [illegible]	AMOUNT FINANCED $ 171.[illegible]	CREDIT INSURANCE CHARGES LIFE $ [illegible]	DISABILITY $ [illegible]	331
TOTAL AMOUNT PAYABLE IN [illegible] MONTHLY INSTALLMENTS		[illegible]	OFFICIAL FEES $ [illegible]	FINANCE CHARGE $ [illegible].64	ANNUAL PERCENTAGE RATE [illegible].47 %	SECURITY INTEREST YES / REAL ESTATE DEED
TOTAL LOAN FEE BREAKDOWN	[illegible] FEE	[illegible] FEE	[illegible]	FINANCE CHARGE	ANNUAL PERCENTAGE RATE	

THIS SECURITY AGREEMENT SECURES FUTURE ADVANCES AS PROVIDED BELOW.

The Undersigned, hereinafter referred to as Debtor, hereby acknowledges receipt of a loan from the above-named corporation, hereinafter called Secured Party, as evidenced by a note of the same date as this agreement, executed by Debtor and payable to Secured Party in the amount and upon the terms as above stated.

In consideration of said loan and to further secure the payment of said note, Debtor hereby conveys and mortgages to Secured Party, its successors and assigns, the chattels hereinafter described; provided, however, if Debtor shall pay and discharge said note according to the terms thereof, then this agreement shall be void; otherwise, it is to remain in full force and effect. All payments made on said note at any time shall be applied to amounts then due, until the indebtedness secured hereby is paid in full.

This Security Agreement is given to secure the payment of said note and any note or notes executed and delivered to Secured Party by Debtor at any time before the entire indebtedness secured hereby shall be paid in full, evidencing either a future advance or advances made solely at Secured Party's option at any time or from time to time, or a refinancing of any unpaid balance of the note above described or renewal thereof, or both such future loan or refinancing. The maximum amount of indebtedness secured by this agreement shall not exceed $2,500.00 in principal amount at any one time.

Debtor hereby warrants said property and agrees to defend Secured Party's in same against all claims and demands whatsoever.

Said Secured Party shall be subrogated to all encumbrances and claims paid off against said property with monies advanced by said Secured Party. Debtor shall keep said property fully insured against all substantial risks or losses, with insurance reasonably related to the type and value of the property insured and the amount and term of loan with loss payable to said Secured Party, and shall pay all premiums and shall pay all taxes and other charges against said property promptly when the same become due. The loss or destruction of said property from any cause, with or without fault of Debtor shall not affect said property promptly when the same become due. The loss or destruction of said property from any cause, with or without fault of Debtor shall not affect in any way the liability of Debtor to repay any and all indebtedness hereby secured. Debtor shall not use said property illegally and shall not remove it from this State and shall not sell, encumber or dispose of said property without the permission of said Secured Party. Debtor shall keep said property in good and serviceable condition and repair and shall not allow the same to be misused or abused.

In addition to all other obligations herein, the Debtor shall pay all actual lawful fees paid to a public official or agency of this State for filing, recording or releasing this instrument (if insurance is obtained by said Secured Party against the risk of non-recording, then in lieu of the fees paid for filing and recording this instrument, the Debtor shall pay the premium actually paid for such insurance); and the Debtor shall also pay the actual and reasonable expenses of repossessing, storing and selling any collateral pledged as security for this contract, if in default.

Debtor may retain possession of said chattels, accessories and equipment, as long as the payments on said note are made by the due date therein provided and all other covenants of this agreement are fulfilled, but Debtor may not permanently remove said property from the County or State without the consent of Secured Party. If Debtor fails to pay any installment of said note when due, or fails to perform any of the covenants hereof, or makes default in any respect, or uses said property contrary to law, or if Secured Party feels insecure for any reason whatsoever, then all installments of said note shall at the option of Secured Party, without notice or demand, become immediately due and payable, and Secured Party may take possession of and remove without liability said property together with any other chattels or things attached thereto or therein contained, without notice, demand, or legal process. The Debtors agree, in the event of declaration of default by the Secured Party, that they shall assemble such collateral and make it available to the Secured Party, at the Debtor's place of residence and the Secured Party may dispose of such collateral on said premises. The Debtor's place of residence shall be at the address given above; or, in the event of removal of the collateral or goods from said address with the Secured Party's consent, then the address to which such goods are removed. The remedies available to the Secured Party shall be governed by, and the Secured Party shall proceed in accordance with the provisions of Article 9 of the Uniform Commercial Code of Georgia.

It is agreed that "Debtor" is to be construed as plural in case there be more than one Debtor.

If possession of said chattels is taken by Secured Party or given up to Secured Party, or said chattels are sold in the manner above described or in any other manner, Debtor covenants that he will assign to Secured Party, or to any person designated by Secured Party, the certificate of title or any other document which is now required or may hereafter be required by any State Motor Vehicle Law. Except as otherwise prohibited by law, Debtor agrees to reimburse Secured Party its reasonable attorneys' fees and legal expenses incurred in the repossession and disposal of the collateral thereunder.

DESCRIPTION OF SECURED PROPERTY: *All of the household and consumer goods (including all chattels used or bought for use primarily for personal, family or household purposes) now or hereafter located in or about the premises constituting the Debtor's residence at their address above set forth or at any other address to which the same may be removed, which shall include but not be limited to any property which may be described in Security List Schedule "A" bearing even date herewith, which, if applicable, is incorporated in and made a part of this Security Agreement, and any property listed below.*

Make	*Model*	*Identification No.*	*Type*	*Year*

(Complete with all equipment, parts and accessories now thereon or hereafter attached thereto by Debtor).

Witness the hands and seals of Debtors this 12 day of Sept 19 73

Signed, sealed and delivered in the presence of:

[illegible signature] — x Mrs Barbara Pollock (SEAL)

Charlene Dalum — x Mr John C. Pollock (SEAL)

BEST COPY AVAILABLE

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-196

GENERAL FINANCE CORPORATION,
Petitioner,

v.

JOHN C. POLLOCK AND BARBARA POLLOCK
Respondents,

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GRAYDON W. FLORENCE, JR.
Suite 2310
First National Bank Tower
Atlanta, Georgia 30303
Attorney for Respondents

September 14, 1977

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES OF SUPREME COURT

CASE AUTHORITY

FEDERAL RESERVE BOARD AUTHORITIES

A. Regulation Z

B. Informal Staff Opinion Letters

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

a) Jurisdictional Statement

Petitioner's jurisdictional statement required by Rule 23 does not comply with the provisions of Rule 23 (b)(i) and (b)(ii), although the information required by those subsections can be found elsewhere in the petition.

b) Questions for Review

Respondents respectfully suggest that the seven questions presented for review by petitioner can be narrowed down to only three questions, which are stated by respondents on pages 1 and 2 of this brief.

c) Statement of the Case

Respondents do not object to petitioner's statement of the case insofar as that statement relates to the facts material to the consideration of the petition. Respondents strenuously object, however, to the fact that petitioner included throughout its statement of the case several conclusory, self-serving statements of its intentions and reliances, which are not supported by the record, and several conclusory, self serving statements of law, rejected by the court below. None of these statements is properly includable in a statement of the case required by Rule 23.

d) Argument

(1) Respondents respectfully submit that the provisions of 15 U.S.C. §1639(a) are clear and unambiguous, in requiring that each of the disclosures itemized in that statute be made. This is evidenced by the fact that the statute provides that the creditor "shall dis-

close each" of the items. 15 U.S.C. §1639(a) (emphasis supplied). Respondents' position is further supported by the grammatical usage section of the Truth in Lending Act, §503 of the Act, 83 Stat. 167, which provides that the use of the word, "shall," indicates that an action of both authorized and required.

(2) In addition, the language of Regulation Z §226.8(d)(1), 12 C.F.R. §226.8(d)(1), can be construed in a manner consistent with the clear requirements of 15 U.S.C. §1639(a), and courts are required to so interpret the regulation.

(3) Informal Staff Opinion Letters of the Federal Reserve Board, while entitled to great weight, are not binding on courts, particularly when they are clearly erroneous, and in contravention of the clear language of the statute and regulation. Further, the 1974 and 1976 amendments to the Truth in Lending Act adding 15 U.S.C. §1640(f) indicate that only rules, regulations and interpretations of the Federal Reserve Board itself, and not of the staff of the Board, are binding and a defense against the imposition of liability. Since Informal Staff Opinion Letters are issued by the staff of the Board, and not by the Board itself, such letters are not binding on courts, and are not a defense against the imposition of liability.

(4) The issues raised by petitioner do not involve important questions of federal law undecided by the Court, and the court below has not decided a federal question in conflict

with the decisions of this Court, nor is there a conflict among the circuit courts of appeals as a result of the decision below, which was rendered in conformity with accepted and usual judicial proceedings. Accordingly, petitioner has failed to meet the requirements of Supreme Court Rule 19 necessary to grant its petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and the petition must be denied.

I. JURISDICTIONAL STATEMENT

Respondents do not question the fact that this Court has jurisdiction under 28 U.S.C. §1254(1) or that petitioner has filed the petition within the time required by 28 U.S.C. §2101(c). Respondents observe, however, that petitioner's jurisdictional statement does not comply with the provisions of Rule 23(b)(i) and (ii), although the information required by those subsections can be found elsewhere in the petition.

QUESTIONS PRESENTED FOR REVIEW

Respondents object to petitioner's formulation of some seven questions to be presented for review, and suggest that these seven questions can be narrowed down to only three questions, none of which meets the requirements of Rule 19:

(1) Whether the clear provisions of 15 U.S.C. §§1639(a)(1), (2), and (3) control over the provisions of 12 C.F.R. §226.8(d)(1), which is ambiguous in part.

(2) Whether courts are bound by Informal Staff Opinion Letters issued by employees of the Board of Governors of the Federal Reserve System.

(3) If and to the extent a creditor relies on an Informal Staff Opinion

Letter, is this reliance a defense against the imposition of liability.

STATEMENT OF THE CASE

Respondents strenuously object to petitioner's statement of the case. Rule 23(e) requires a concise statement of the case containing the facts material to consideration of the questions presented. Petitioner has chosen to set forth the statement of the case together with petitioner's own self-serving statements as to its intentions and reliances, which are unsupported by the record, 1/ and has further stated conclusions of law without citing any authority whatsoever for the statement. 2/

1/ See, e.g., petition at p. 5: "G.F.C. relied on the provisions of 12 C.F.R. §226.8(d)(1) . . ." (emphasis supplied), and petition at p. 6: "G.F.C. used the word 'may' in its disclosure ststement [sic], because Georgia has adopted the Uniform Commercial Code . . . ." There are no affidavits or other evidence before this Court to support either of the self-serving statements of petitioner.

2/ See, e.g., petition at p. 6: ". . . 12 C.F.R. §226.8(d)(1) . . . does not require disclosure of net loan proceeds." In fact, this conclusion of law was rejected by the court below.

In any event, petitioner's statement of the case certainly does not comply with Rule 23(e), which requires a "concise statement of the case containing the facts material to the consideration of the questions presented." Conclusory, self-serving statements of intentions, reliances, and of law, all of which are totally unsupported by the record, have no place in a statement of the case.

ARGUMENT

A. The Clear Language of 15 U.S.C. §§1639(a)(1), (2), and (3) Control Over the Ambiguous Language of 12 C.F.R. §226.8(d)(1).

Petitioner General Finance Corporation is what is commonly referred to as a "closed end" loan creditor. As such, it must, in part, make the disclosures required by 15 U.S.C. §1639, which requires that petitioner

> . . . shall disclose each of the following items, to the extent applicable:

> (1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.
>
> (2) All charges, individually itemized, which are included in the amount of credit extended which are not part of the finance charge.
>
> (3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)). (Emphasis supplied.)

It is imminently clear that 15 U.S.C. §1639(a) mandates that each of the disclosures shall be made, if applicable. The use of the word "shall" in the statute indicates that the disclosure is required. 3/

3/ §503 of the Truth in Lending Act, 83 Stat. 167, sets out the rules for grammatical usage for the Act, and provides in its relevant part that

> (2) [t]he word "shall" is used to indicate that an action is both authorized and required. (Emphasis supplied.)

Accordingly, each of the applicable 15 U.S.C. §1639(a) disclosures is required to be made.

Since in the instant case, each of the three items is applicable, each must be disclosed under the clear language of 15 U.S.C. §1639(a). Numerous courts have so held. E.g., Liner v. Aetna Finance Corp., 555 F.2d 1241 (5th Cir. 1977); Pollock v. General Finance Corp., 535 F.2d 295 (5th Cir. 1976), reh'g denied, 522 F.2d 1142 (5th Cir. 1977); Goodwin v. Beneficial Finance Co. of Alabama, 338 So.2d 1011 (Ala. 1976); see, McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73 (5th Cir. 1977).

These cases all stand for the proposition that closed end loan creditors such as petitioner are required under the provisions of 15 U.S.C. §1639(a)(1) to disclose the amount of credit of which the obligor has the use. In addition, charges such as recording fees, credit life insurance and credit disability insurance must be individually itemized as other charges under the provisions of 15 U.S.C. §1639(a)(2). The sum of the amounts disclosed under 15 U.S.C. §§1639(a)(1) and (a)(2) must be disclosed under 15 U.S.C. §1639(a)(3). Each of the disclosures "shall" be made under the provisions of this statute.4/

When interpreting a statute, one of the cardinal rules of statutory construction is that "the meaning of the statute must, in the first instance, be sought in the language in which the Act was framed, and if that is plain, . . . the sole function of the courts

---

4/ See footnote 3, supra.

is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). One court has also stated that "there is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction." Swarts v. Siegel, 117 F. 13, 18-19, (8th Cir. 1902). The language of 15 U.S.C. §§1639 (a)(1), (2), and (3) is crystal clear in requiring disclosure of each of the three elements: There is nothing whatsoever ambiguous about the statute. Accordingly, each of the elements must be disclosed, pursuant to the statute itself, without reference to its implementing regulation.5/

5/ 15 U.S.C. §1639(a)(1) deals with the amount of credit of which the obligor will have the actual use. In other words, disclosures required by this statute pertain to credit benefiting the obligor directly, such as cash to the obligor and consolidation of other obligations. Since these benefit the obligor directly, only the cumulative amount need be disclosed.

On the other hand, the "charges" to be "individually itemized" under 15 U.S.C. §1639(a)(2) relate to charges such as recording fees to perfect a security interest, credit life insurance, or credit disability insurance, all of which are designed to benefit the creditor, not the obligor. Since the creditor is the direct beneficiary of these charges (and often gets a

Petitioner asserts, however, that 12 C.F.R. §226.8(d)(1) compels a different result. That section of Regulation Z requires that creditors such as petitioner shall be disclosed, as applicable,

> (1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."
>
> 12 C.F.R. §226.8(d)(1).

If and to the extent there is any ambiguity present, the ambiguity arises from the fact that the Federal Reserve Board chose to combine the three disclosures required by 15 U.S.C. §§1639 (a)(1), (2), and (3) into only one

5/ (cont'd) substantial premium or kickback from the insurance company for selling the so-called "voluntary" credit insurance), the charges must be individually itemized.

section of Regulation Z (12 C.F.R. §226.8(d)(1)).6/

Reviewing 12 C.F.R. §226.8(d)(1) reveals that it virtually tracks the language of the three sections of 15 U.S.C. §1639(a)(1), (2), and (3). First, 12 C.F.R. §226.8(d)(1) requires disclosure of "the amount of credit... which will be paid to the customer or for his account or to another person on his behalf . . . ." This is virtually the identical language contained in 15 U.S.C. §1639(a)(1), and pertains to credit benefiting the obligor himself, and not the creditor. See footnote 5, supra.

Second, 12 C.F.R. §226.8(d)(1) requires the disclosure of "all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge...." This language is identical to the language contained in 15 U.S.C. §1639(a)(2), and pertains to charges benefiting the creditor, not the obligor. See footnote 5, supra.

Third, 12 C.F.R. §226.8(d)(1) requires disclosure of the sum of these elements, using the term "amount financed." This is directly analogous to the requirements imposed by 15 U.S.C. §1639(a)(3).

The Federal Reserve Board promulgated Regulation Z in accordance with the congressional mandate contained at 15 U.S.C. §1604:

> The [Federal Reserve] Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purpose of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. (Emphasis supplied.)

6/ This ambiguity results from the fact that the words "individually itemized" could modify only "all charges," or could modify both "the amount of credit . . . . which will be paid to the customer or for his account or to another person on his behalf," and also "all charges." It appears that the Federal Reserve Board, pursuant to the authority granted in 15 U.S.C. §1604, could choose to require individual itemization of all elements of the amount financed, since such individual itemization would provide for more meaningful disclosure of credit terms, thereby enabling the consumer to truly comparison shop as to the costs of credit. See 15 U.S.C. §1601; 12 C.F.R. §226.1. Under either construction of the Regulation, however, the amount of credit of which the obligor has the use must be disclosed.

The Congress delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 365 (1973). These regulations must, however, carry out the purposes of the Act. The only time the Federal Reserve Board can make adjustments or exceptions to the Act is when to do so is to effectuate the purposes of the Act. It appears that to require by regulation the itemization of all elements of the amount financed could effectuate the purpose of the Act by providing a more meaningful disclosure of credit terms; to narrow the required disclosures in the manner suggested by petitioner would be outside the power of the Federal Reserve Board.

Respondents have shown that the disclosures required by 12 C.F.R. §226.8(d)(1) are indeed consonant with the disclosures required by 15 U.S.C. §§1639(a)(1), (2), and (3). To the extent there is a conflict, however, the provisions of the Regulation itself must fall, since the regulations are promulgated by administrative agencies, and not Congress. In the event of a conflict, the power of such an agency

> ... to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law -- for no such power can be delegated by Congress -- but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is mere nullity. Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936).

See also, e.g., Peters v. Hobby, 349 U.S. 331 (1955); Fawcus Mach. Co. v. United States, 282 U.S. 375 (1931); Helvering v. Sabine Transp. Co., Inc., 318 U.S. 306 (1943).

Since the Regulation is indeed consonant with the statute itself, the decision of the Fifth Circuit is correct.

Petitioner also relies on certain Informal Staff Opinion Letters of the Federal Reserve Board to support its position that 12 C.F.R. §226.8(d)(1) does not require disclosure of the amount of credit of which the borrower has the use. E.g., Informal Staff Opinion Letter of January 6, 1976, a copy of which was attached as Exhibit B-2 of the respondents' brief in opposition to petitioner's petition for rehearing; Letter No. 982, 4 CCH Consumer Credit Guide ¶31321 (Dec. 24, 1975); Letter No. 967, 4 CCH Consumer Credit Guide ¶31306 (Dec. 4, 1975). While these letters do stand for the proposition for which they are cited, they are clearly inconsistent with the requirements of the statute (and of the Regulation itself) and, based on the above analysis, are clearly erroneous, and entitled to no weight whatsoever.

The effect to be given these Board Letters will be discussed in the following section.

B. Informal Staff Opinion Letters of Employees of the Federal Reserve Board Are Not Controlling on Courts, and Are Not A Defense to the Imposition to Statutory Liability.

On each of these issues raised by petitioner herein, petitioner now contends that it relied on certain Informal Staff Opinion Letters issued by employees of the Federal Reserve Board.7/ Petitioner contends that these letters are absolutely binding on this Court, and further contends that these letters are an absolute defense to the imposition for statutory liability. Neither of these contentions has merit.

Initially, it must be observed that Informal Staff Opinion Letters are issued by employees of the Federal Reserve Board, and not by the Board itself, and are usually issued in response to a question regarding a particular factual situation. These letters attempt to explain the provisions of the Truth in Lending Act, Regulation Z, and Federal Reserve

7/ There is no affidavit or other evidence before this Court establishing any such reliance by petitioner.

Board Interpretations of Regulation Z. Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 976 (5th Cir. 1974). Indeed, the Fifth Circuit, when ruling on the instant petitioner's petition for rehearing, noted that these Informal Staff Opinion Letters are the "least authoritative pronouncements" of the Federal Reserve Board. 522 F.2d at 1144.

The Congress clearly granted the Federal Reserve Board broad authority to promulgate regulations necessary to render the Truth in Lending Act effective. E.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356, 365 (1973). While the Federal Reserve Board's pronouncements are entitled to great weight, they are not binding on courts and can, in fact, be totally rejected. See, e.g., Jones v. Community Loan & Investment Corp. of Fulton County, 526 F.2d 642 (5th Cir. 1976), reh'g denied, 544 F.2d 1228 (5th Cir. 1977), cert. denied, 45 U.S.L.W. 3764 (1977); Martin v. Commercial Securities Co., Inc., 539 F.2d 521 (5th Cir. 1976); Mirabal v. General Motors Acceptance Corp., 537 F.2d 871 (7th Cir. 1976); Pennino v. Morris Kirschman & Co., 526 F.2d 367 (5th Cir. 1976); Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975).

An administrative agency's construction of a regulation such as Regulation Z must be reasonably related to the purpose of the legislation itself. Thorpe v. Housing

Authority of the City of Durham, 393 U.S. 268, 280-81 (1969).

As the Court stated in Zuber v. Allen, 396 U.S. 168 (1969),

> [w]hile this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation. . ., it is only one input in the interpretational equation....
>
> The Court may not, however, abdicate its ultimate responsibility to construe language employed by Congress. Id., 396 U.S. at 192-193.

Thus, the intention of Congress is relevant in the first instance in choosing between various possible constructions. That is to say, an administrative regulation does not exist in a vacuum, but must be interpreted in a manner consistent with the purposes of the legislation as enunciated by Congress. This Court has so declared in Mourning v. Family Publications Service, Inc., 411 U.S. 356, 371 (1973). Accordingly, Informal Staff Opinion Letters issued by employees of the Federal Reserve Board which render Regulation Z inconsistent with the Truth in Lending Act itself must be totally discredited.

Further, reliance on these Informal Staff Opinion Letters is not a defense to the imposition of civil liability. Once a violation has been found, the only defenses to the assessment of statutory damages must arise under either 15 U.S.C. §§1640(c) or 1640(f). There are no other defenses available. Unless a creditor can establish that it is protected by one of these sections, the court must impose liability and award statutory damages.

The overwhelming majority of courts which have ruled on the bona fide error defense available under 15 U.S.C. §1640 (c) have held that this defense is available only for clerical errors which occurred despite a system for correcting them. E.g., Mirabal v. General Motors Acceptance Corp., supra; Ives v. W. T. Grant Co., supra; Haynes v. Logan Furniture Mart, 503 F.2d 1161 (7th Cir. 1974); Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974); Pedro v. Pacific Plan of California, 393 F.Supp. 315 (N.D. Cal. 1975); Doggett v. Ritter Finance Co. of Louisa, 384 F.Supp. 150 (W.D. Va. 1974); Buford v. American Finance Co., 333 F.Supp. 1243 (N.D.Ga. 1971); Ratner v. Chemical Bank New York Trust Co., 329 F.Supp. 270 (S.D.N.Y. 1971). Even if the instant petitioner unintentionally violated the Act, there is no question but that it intentionally omitted the required disclosures. This is not a clerical error, and a defense under 15 U.S.C. §1640(c) is not available to it.

In 1974, Congress amended the Truth in Lending Act to add 15 U.S.C. §1640(f), to provide an additional defense to the imposition of statutory liability. That section provides a defense for unintentional and bona fide errors made in reliance on a "rule, regulation, or interpretation" of the Federal Reserve Board. That defense is also not available to petitioner.

In Ives v. W. T. Grant Co., supra, the creditor argued that 15 U.S.C. §1640(f) should be construed to include Informal Staff Opinion Letters of the Federal Reserve Board and to include pamphlets provided by the Board as a defense against liability. The court noted that this position was anticipated by Congress, and expressly repudiated in Senate Report No. 93-278, Senate Committee on Banking, Housing and Urban Affairs, Truth in Lending Act Amendments [S. 2101], 93rd Cong., 1st Sess., at p. 13. In that proceeding the Committee recommended that the Act be amended to relieve a creditor of civil liability for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board. The Senate Report stated that:

> In order to confer immunity from civil liability, the rule, regulation, or interpretation thereof must be approved by the Board itself, and not by the staff of the Board.
> Id.

The Ives court rejected the creditor's contention, noting that the creditor's defense "based upon purported reliance on staff letters and pamphlets is legally insufficient under [15 U.S.C. §1640(f)]." Ives, supra, 522 F.2d at 758.

Similarly, in Pennino v. Morris Kirschman & Co., supra, the court followed the Second Circuit and held that a 15 U.S.C. §1640(f) defense was not available unless there was reliance on a rule, regulation, or interpretation of the Federal Reserve Board itself. Id., 526 F.2d at 370, n. 3, 371, n. 8. Accordingly, a 15 U.S.C. §1640(f) is not available to petitioner since the Federal Reserve Board itself has not spoken as to any of the issues raised by petitioner herein.

As a final point, petitioner is a multi-state lender, and is certainly charged with knowledge of the developing case authority under the Truth in Lending Act. To allow petitioner to avoid statutory liability on the facts before this Court would do violence to the very purpose of the Act itself.

CONCLUSION

The Fifth Circuit thoroughly considered the issues before it in its initial opinion rendered at 535 F.2d 295. After receiving this adverse decision, petitioner filed a petition for rehearing en banc. Respondents were granted permission and filed a brief in opposition to the petition for rehearing en banc. In addition, there were two amici curiae briefs filed in support of petitioner's position, one by Industrial Finance & Thrift Corp., and the second by the Federal Reserve Board itself. The Fifth Circuit again thoroughly considered the arguments of the parties, as well as the positions of the amici, and upheld its earlier ruling, as reported at 552 F.2d 1142.

It seems imminently clear that over the period of time of more than two years between the filing of the notice of appeal in this case and the entry of the Fifth Circuit's second opinion in 1977, the Fifth Circuit made a most meticulous inquiry as to the merits of the case, after thoroughly considering all points of view, particularly the point of view of the Federal Reserve Board itself. After considering all points, the Fifth Circuit again ruled in respondents' favor. Respondents respectfully submit that the decisions of the Fifth Circuit should not be disturbed.

When considering the instant petition, this Court should not neglect to note that there is no major controversy of national significance involved. There is no question but that a clear and

unambiguous statute must be enforced in accordance with its terms. This Court has so ruled on may occasions. E.g., Caminetti v. United States, 242 U.S. 470, 485 (1917). This "plain meaning" rule controls even where an administrative agency has been delegated broad authority to promulgate regulations, and particularly where the agency has interpreted the regulation by Informal Staff Opinion Letters in derogation of the Regulation itself which can be construed in a manner consonant with the statute. Again, this Court has so ruled on many occasions. E.g., Zuber v. Allen, 396 U.S. 168, 192-193 (1969); Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936).

Secondly, the question of whether the Informal Staff Opinion Letters issued by an employee of the Federal Reserve Board are binding on courts has been decided adversely to petitioner's position by both decisions of numerous courts of appeals, and by Congress itself, when enacting 15 U.S.C. §1640(f).

Thirdly, there is no conflict among the circuit courts of appeals, there are no undetermined but important questions of federal law involved, and there is no meritorious contention that the United States Court of Appeals for the Fifth Circuit has departed from the accepted and unusual course of judicial proceedings.

Further, it does not appear that any person faces significant liability if the instant petition is denied. Decisions are uniform in holding that the Truth in Lending Act is a remedial statute, to be liberally and favorably

construed in favor of the consumer. The statutory penalty imposed is small in light of the important national policy of providing a meaningful disclosure of credit terms.

Indeed, it is a very simple matter for a multi-state creditor such as petitioner to revise its disclosure forms to comply with judicial decisions as clearly correct as the one under review here. Petitioner has not asserted, and indeed cannot assert, that it would violate the Act by revising its forms to provide the more meaningful disclosures required by the lower court, and by numerous other decisions. Had petitioner chosen to revise its forms at the time of the decision herein, it would have very limited, and perhaps no, civil liability whatsoever (except in the instant case) for such violations in light of the one-year statute of limitations imposed under 15 U.S.C. §1640(e). If and to the extent that petitioner has failed to revise its forms in accordance with judicial decisions, it does so at its own folly.

In summary, respondents respectfully submit that the United States Court of Appeals for the Fifth Circuit applied the proper legal standards in considering the legal issues before it. The Fifth Circuit thoroughly considered the arguments and briefs of counsel for the parties, as well as the briefs of amici curiae filed on behalf of petitioner by the Federal Reserve Board itself and Industrial

Finance & Thrift Corporation, another multi-state creditor. Respondents respectfully submit that the lower court thoroughly and correctly decided all issues before it, and request that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GRAYDON W. FLORENCE, JR.
Attorney for Respondents

Suite 2310
First National Bank Tower
Atlanta, Georgia 30303

588-1000

CERTIFICATE OF SERVICE

This is to certify that I have this day served three (3) copies of the foregoing Brief in Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by depositing said copies in the United States mail, with air mail postage prepaid, addressed to:

Milton Schober, Esq.
Terrence H. Klasky, Esq.
1750 Pennsylvania Avenue, N.W.
Suite 1107
Washington, D.C. 20006

This the 14th day of September, 1977.

GRAYDON W. FLORENCE, JR.

6